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## Freedom from Value Judgments: Value-Free Social Science and Objectivity in Germany, 1880-1914

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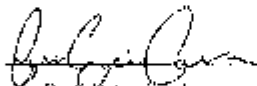
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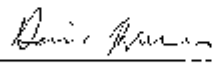
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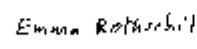
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Freedom from Value Judgments:  
Value-Free Social Science and Objectivity in Germany, 1880-1914

A dissertation presented

by

Andrew Jeffrey Spadafora

to

The Department of History

in partial fulfillment of the requirements

for the degree of

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Freedom from Value Judgments:

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### **Abstract**

This dissertation addresses a central issue in the methodological debates that raged in the German academy around the turn of the twentieth century. The idea of “value-free” social science, or “value-freedom,” was passed down to subsequent decades as a way of thinking about the objectivity of knowledge, but because of its name it has been widely misunderstood. Moreover, it has been seen either as a clever invention of the polymath scholar Max Weber, or as some form of ideology masquerading as neutrality (or both). Instead, a contextually sensitive historical analysis of the work of five German and Austrian scholars—Carl Menger, Ferdinand Tönnies, Georg Jellinek, Hermann Kantorowicz, and Gustav Radbruch—demonstrates that value-freedom was a complex doctrine with widely ramified sources in the intellectual history of economics, sociology, and law. It was accepted on a variety of grounds and by individuals of differing personalities, politics, philosophical training, and academic disciplines.

“Value-free” social science in the work of these men meant anything but the removal of values from scholarly consideration. Instead, its advocates promoted a focus on the subjectivity and the will of the individual, goal-directed agent. Value-freedom took the form of several interrelated distinctions, between theory and practice, fact and value, “is” and “ought,” means and ends; but each of these scholars coupled his preferred formulation with the shared view that human values are incapable of *rational* justification. They insisted on the importance of the analytical separation of the positive and normative but recognized a legitimate role for the social sciences in the positive discussion of values. However, the attempt to bridge the subjective world of human values and the objective world of social scientific fact foundered for most of them on the inherently subjective choices made by the individual scholar, leading them to face the possibility that value-freedom could not provide a successful theory of objectivity without reformulation. The dissertation spans three decades and several disciplines, including the work of important jurists whose social scientific credentials have been neglected owing to their disciplinary backgrounds.

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Cambridge, Massachusetts

May 16, 2013

## Chapter 1.

### Introduction: Value-Freedom and Objectivity in Max Weber's Germany

This is a study of a badly named but highly influential concept. In the course of the twentieth century, many European and especially American practitioners of social science who were concerned to justify the objectivity of their work began to refer to it as “value-free.”<sup>1</sup> Although never lacking critics, the term gained popularity among practicing social and natural scientists and even among philosophers of science in the two decades after the Second World War, and the ostensible idea behind it achieved a kind of commonsense status.<sup>2</sup> Like many terms that suddenly enjoy a vogue, the predicate “value-free” was not given a rigorous definition, but its meaning seemed readily apparent. The social or natural sciences would reach the desired “objective” status when practicing scientists<sup>3</sup> had suitably excluded their values from their analyses and proceeded to deal solely with the facts they were endeavoring to explain.

Or so it appeared. Of course, the complete removal of values from any science, let alone from social science, was impossible; anyone claiming to be a practitioner of “value-free” social science in this commonsense understanding of the term was mistaken. For as a wide body of philosophical literature has shown in the subsequent decades, it is not possible even for natural scientists to set their values aside completely. At a minimum, those that came to be known as

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<sup>1</sup> See the essays on particular social science disciplines in Theodore M. Porter and Dorothy Ross, eds., *The Cambridge History of Science*, Vol. 7, *The Modern Social Sciences* (Cambridge: Cambridge University Press, 2008), e.g. Dorothy Ross, “Changing Contours of the Social Science Disciplines,” 217-218; James Farr, “Political Science,” 316-318; Robert C. Bannister, “Sociology,” 335, 346; Dorothy Ross, *The Origins of American Social Science* (Cambridge: Cambridge University Press, 1991), 429.

<sup>2</sup> On the postwar history of the idea, principally from a philosophy of science perspective, see Heather E. Douglas, *Science, Policy, and the Value-Free Ideal* (Pittsburgh: University of Pittsburgh Press, 2009), 46-65.

<sup>3</sup> Throughout this dissertation, the words “science” and “scientist” are used as translations of the German *Wissenschaft* and *Wissenschaftler*, to indicate an “organized body of knowledge” and the scholars who produce it, rather than according to the common English meaning of “natural science” or “natural scientist.” Science and scholarship are treated as synonyms. This usage is purely for purposes of convenience and does not imply any identification of the social sciences with the natural sciences.



“epistemic” or “cognitive” values, such as “accuracy, consistency, predictive and explanatory scope, simplicity and fruitfulness in generating research puzzles..., instrumental efficacy... or ‘prediction and control,’ ... [a] high degree of falsifiability,” and many others, were necessary to determine what counted as an effective theory.<sup>4</sup> A chorus of critics has argued, often plausibly, that even this distinction between epistemic values internal to the sciences on the one hand, and personal or social values on the other, is impossible to draw consistently.<sup>5</sup>

The philosopher Hilary Putnam offers an important case in point. His work contends that the concept of a clear-cut dichotomy or dualism (as opposed to a softer “distinction”) between the categories of “fact” and “value,” which lies at the heart of the “value-free” science ideal, is not justifiable, owing especially to linguistic and epistemic considerations. The “practices of scientific inquiry upon which we rely to decide what is and what is not fact, suppose values.” Because an “enormous amount of our descriptive vocabulary” is necessarily “entangled” with our values, description and valuation are interdependent rather than separable. For these reasons he criticizes the attempt, which he dates to the early 1930s, of many economists to reject the idea that they should explicitly concern themselves with the welfare of society, and to adopt instead a “value neutral criterion of optimal economic functioning,” epitomized by Pareto optimality. Instead, he is sympathetic to the position of “second phase classical [economic] theory,” like that of Amartya Sen, in which ethical concerns and concepts are introduced into the discipline

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<sup>4</sup> For an overview, see Hugh Lacey, *Is Science Value-Free? Values and Scientific Understanding* (London: Routledge, 1999), chapters 2 and 3; this partial list is quoted from Lacey, 53. An early version of this view is Carl Hempel, “Science and Human Values,” in Hempel, *Aspects of Scientific Explanation* (New York: Free Press, 1965); various later versions of it are supported by Lacey, Larry Laudan, and others: see the essays by Laudan, Lacey and Mauro Dorato in Peter Machamer and Gereon Wolters, *Science, Values, and Objectivity* (Pittsburgh: University of Pittsburgh Press, 2004).

<sup>5</sup> See, for instance, Barry Barnes, “Transcending the Discourse of Social Influences,” in Machamer and Wolters, eds., *Science, Values, and Objectivity*; Harold Kincaid, John Dupré, and Alison Wylie, eds., *Value-Free Science: Ideals and Illusions* (Oxford: Oxford University Press, 2007); Douglas, *Science, Policy, and the Value-Free Ideal*, 89ff.

*without* the abandonment of its “rigorous tools.”<sup>6</sup> Such work offers insuperable obstacles to the commonsense idea of “value-free” social science by removing the possibility of relying on simplistic notions of fact, which are at its core. More contentiously, others have even claimed that the “value-free” ideal not only fails to secure scientific objectivity through the exclusion of values but actively stands in the way of a just social order—as the latter is defined by these critics.<sup>7</sup>

In light of these criticisms, it would appear that those who originally formulated the ideal as a way of speaking about objectivity had simply introduced an error into the philosophy of science, and perhaps a malicious one. Did they really do so? And *who* were they? The philosophers who have discussed the idea have generally traced its origins back to the ideas of other philosophers, and not unreasonably. In particular, the idea is said to have arisen in the work of David Hume, in his distinction between what “Is” and what “Ought” to be and his insistence that moral judgments were not matters of fact.<sup>8</sup> And yet, while these distinctions and the idea of the “naturalistic fallacy”<sup>9</sup> are indeed at the heart of the ideal, neither Hume nor Kant, who is sometimes considered a second philosophical source, used the term “value-free,” nor did they aim to describe a canon of social scientific methodology.

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<sup>6</sup> Hilary Putnam, *Reason, Truth and History* (Cambridge: Cambridge University Press, 1981), 128, 135-37; id., *The Collapse of the Fact/Value Distinction and Other Essays* (Cambridge, Mass.: Harvard University Press, 2002), 60-62, 49-54.

<sup>7</sup> In the German context, the *locus classicus* is the dispute beginning in 1961 and continuing throughout the 1960s between the “critical rationalists” Karl Popper and Hans Albert, and the “critical theorists” Theodor Adorno and Jürgen Habermas. For Habermas’s arguments against “value-free” science and instrumental reason (a major interest of the critical theorists generally) see his “Analytical Theory of Science and Dialectics,” in Theodor Adorno, ed., *The Positivist Dispute in German Sociology*, trans. Glyn Adey and David Frisby (London: Heinemann, 1976), 142, 145, 158-160; 162.

<sup>8</sup> For instance, see Putnam, *Collapse of the Fact/Value Dichotomy*, 14-19, esp. 16-17.

<sup>9</sup> This was the interpretation of Hume’s point about the impossibility of generating “Ought” statements on the basis of “Is” statements which saw the practice as a logical error. The term is owing to G.E. Moore, who used it in a slightly different way. On the general problem and Hume’s contribution in particular, see W.D. Hudson, ed., *The Is/Ought Question* (London: Macmillan, 1969).

The third source typically cited is the German social scientist Max Weber, who *did* use the terms “*wertfrei*” and “*Wertfreiheit*,” from which the equally awkward-sounding English “value-free” and “value-freedom” derive, and who *was* attempting to clarify methodological problems in social science.<sup>10</sup> A certain interpretation of Weber’s work, as the paradigm of a politically neutral sociology appropriate for technocratic needs, deeply marked the self-conception of American sociology, and to a lesser extent of other disciplines, in the postwar era under the leadership of men like Talcott Parsons, Edward Shils, and Reinhard Bendix,<sup>11</sup> and it was at least in large part through this quasi-Weberian lens that mid-century social scientists came to see their work as striving for value-freedom.<sup>12</sup> It is, however, also well-known by now that this received interpretation of Weber has not held up to historical scrutiny,<sup>13</sup> and the reasonable doubts about it include the notion that Weber advanced a *value-free* science of the “commonsense” variety, as we shall aim to persuade the reader at the end of this introduction. Not for nothing did Weber always use quotation marks in referring to “*Wertfreiheit*.” Any sustained attention to Weber’s original texts would have quickly shown some of the subsequent

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<sup>10</sup> See, e.g., Putnam, *Reason, Truth, and History*, 174, where he describes Weber as having “introduced the modern fact-value distinction”; Dorato, “Epistemic and Non-Epistemic Values in Science,” in Machamer and Wolters, *Science, Values, and Objectivity*, 56. Much of the literature dealing with value-freedom has taken the form of an attempt to put Weber in “dialogue” with later thinkers who did not form part of his intellectual context. See, for example, George McCarthy, *Objectivity and the Silence of Reason: Weber, Habermas, and the Methodological Disputes in German Sociology* (New Brunswick: Transaction, 2001); Darrow Schechter, *The Critique of Instrumental Reason from Weber to Habermas* (New York: Continuum, 2010); Nasser Behnegar, *Leo Strauss, Max Weber, and the Scientific Study of Politics* (Chicago: University of Chicago Press, 2003). Such approaches are perfectly legitimate and show the lasting power and contemporaneity of Weber’s thought, but they also tend to introduce ideas common in Weber’s milieu as insights of his own, and cannot claim to present Weber’s thought in a context he would have personally recognized.

<sup>11</sup> On the reception of Weber in the United States, see now Lawrence Scaff, *Max Weber in America* (Princeton: Princeton University Press, 2011), chapters 11-13.

<sup>12</sup> This is reflected in the occasional use of the German term *wertfrei* itself (and, significantly, *without* quotation marks) in important English-language texts marked by the “value-free” ideal in this period. See, for example, Lionel Robbins, *An Essay on the Nature and Significance of Economic Science*, 2d ed. (London: Macmillan, 1935), 90-91; James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962), vii.

<sup>13</sup> For a critical view, see Sven Eliaeson, *Max Weber’s Methodologies: Interpretation and Critique* (Cambridge: Polity, 2002), Ch.4, although note that Eliaeson strangely identifies “American social thought” with Straussianism: 151.

denunciations of the idea of value-freedom to be directed against a straw-man<sup>14</sup>; had Weber chosen a more appropriate term for his conception, some (although hardly all) of the subsequent confusion and debate about the idea might have been avoided.<sup>15</sup>

But if attention to the original historical context of the idea could help to demonstrate the nuanced position Weber actually held on the proper role of values in scholarship, perhaps it could also illuminate the meaning of “value-freedom” more broadly through a historical examination of the work of some of his peers and predecessors. For surely the notion of value-freedom did not originate with Weber alone. And we have the example of a distinguished body of historical scholarship on the related idea of objectivity in the natural and statistical sciences of the later nineteenth and early twentieth centuries to show how substantial a contribution the history of ideas can make in clarifying key concepts still being vigorously debated.<sup>16</sup> This dissertation aims to perform a similar service on a modest scale by investigating the intellectual origins of, and the forms taken by, the idea of value-freedom in the work of a half dozen of Weber’s colleagues and interlocutors, particularly the economist Carl Menger (1840-1921), the sociologist Ferdinand Tönnies (1855-1936), and the jurists Georg Jellinek (1851-1911), Hermann Kantorowicz (1877-1940), and Gustav Radbruch (1878-1949).

These thinkers did not themselves define the terms “value-freedom” or “objectivity,” and some of them did not even use these terms, but rather only ideas that later fell under the value-

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<sup>14</sup> This holds for those critics who have pointed out that scientists and scholars cannot successfully purge themselves of all their value commitments and that valuations are always implicated in the social scientist’s “facts”—a problem of which Weber was well aware.

<sup>15</sup> Challenges to the idea of a uniform *rationality* that have been raised in the twentieth century after Weber’s death *do* have implications for the adequacy of Weber’s arguments and are not resolvable by a more careful study of his texts: see the classic collection *Rationality*, ed. Bryan Wilson (Oxford: Blackwell, 1970) and its later companion, Martin Hollis and Steven Lukes, eds., *Rationality and Relativism* (Oxford: Blackwell, 1982).

<sup>16</sup> Lorraine Daston and Peter Galison, *Objectivity* (New York: Zone, 2007); Lorraine Daston, “Objectivity and the Escape from Perspective,” *Social Studies of Science* 22 (1992), 597-618; Theodore Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (Princeton: Princeton University Press, 1995); Allan Megill, ed., *Rethinking Objectivity* (Durham: Duke University Press, 1994).

freedom rubric. We should not, consequently, expect complete uniformity in the vocabularies they used to discuss these ideas. Nonetheless, it will help to have working definitions of “value” and of “objectivity” that are appropriate to the ways in which they were used in this period. The term *value* (or *values*) is very open-ended, but the *Oxford English Dictionary* designates two principal categories of meanings: “[w]orth or quality as measured by a standard of equivalence,” such as is often found in assessing the economic value of an object, or “[w]orth based on esteem; quality viewed in terms of importance, usefulness, desirability, etc.,” particularly including “[t]he principles or moral standards held by a person or social group; the generally accepted or personally held judgement of what is valuable and important in life.”<sup>17</sup> The term as used here will designate particularly the sense in which a value is a source of normative orientation for human agents. As the subtle Max Weber scholar Guy Oakes has put it, for Weber, as for his peers, “[i]n cultural life, values represent positions taken by actors,”<sup>18</sup> and we might add that they can consequently be seen as functionally equivalent to ends or goals. A *value judgment* is an assessment on the basis of accord or discord with the actor’s source of normative orientation; *value-freedom* is the absence of values defined in this way.<sup>19</sup>

*Objectivity* too presents a range of meanings, but the recent study by Lorraine Daston and Peter Galison helps to define the issues that are relevant here. Daston and Galison persuasively argue that “objectivity is the suppression of some aspect of the self, the countering of subjectivity. Objectivity and subjectivity define each other, like left and right or up and down....

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<sup>17</sup> *The Oxford English Dictionary*, 2d ed. (with corrections), ed. J.A. Simpson and E.S.C. Weiner, 20 vols. (Oxford: Clarendon Press, 2001) 19:415:3-417:3 (s.v. “value”).

<sup>18</sup> Guy Oakes, “On the Unity of Max Weber’s Methodology,” review essay, *International Journal of Politics, Culture and Society* 12:2 (1998), 293-306, here 296.

<sup>19</sup> In this dissertation, the term value-freedom is employed without quotation marks, for aesthetic reasons owing to its continual use. What we will find, however, is that these thinkers advocated “value-freedom” in quotation marks—that is to say, it is the particular interpretation of the doctrine that does not require, and indeed rejects, the absolute elimination of values from scientific knowledge, or what we have described as the commonsense understanding of value-freedom.

If objectivity was summoned into existence to negate subjectivity, then the emergence of objectivity must tally with the emergence of a certain kind of willful self, one perceived as endangering scientific knowledge.”<sup>20</sup> This is precisely the sense in which objectivity will appear in the discussion below. For the value-freedom advocates, objectivity is the problem that arises when the suppression of certain subjective elements in individual selves is perceived as problematic, precisely because of the unavoidability of values in all social phenomena – values being conceived by those advocates as the subjective elements. Such subjective elements seem to threaten the reliability and trustworthiness of scientific findings. One increasingly popular means of dealing with this problem in the second half of the nineteenth century was the mode of objectivity, or “epistemic virtue,” which Daston and Galison label “mechanical objectivity.”<sup>21</sup> This was associated with “the insistent drive to repress the willful intervention of the artist-author [i.e., the subjective self], and to put in its stead a set of procedures that would, as it were, move nature to the page through a strict protocol, if not automatically.”<sup>22</sup> Scientists, including social scientists, who aimed to secure their work against the intrusion of subjectivity in this way advocated what amounted to an ascetic discipline: purging themselves of willfulness, bias, and the intervention of arbitrary or personal elements.<sup>23</sup> This set of beliefs and practices will be called “ascetic objectivity”<sup>24</sup> in the following chapters, and it will be associated with the nineteenth-century positivist scientific ideals that are on display in Daston’s and Galison’s work; perhaps surprisingly, however, it also constitutes a manner of looking at objectivity that the value-freedom advocates attempted, without great success, to overcome, as we shall see.

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<sup>20</sup> Daston and Galison, *Objectivity*, 36-37.

<sup>21</sup> *Ibid.*, 18.

<sup>22</sup> *Ibid.*, 121.

<sup>23</sup> *Ibid.*, 373-75.

<sup>24</sup> Daston and Galison remark, appropriately, on the connection to asceticism in the previous passage; the use of this term is even more appropriate in the German social sciences in the era between Friedrich Nietzsche and Max Weber.

For whatever reason, few historians have taken up the task of examining the general intellectual context of the idea of value-freedom in a sustained way; at least, historical interest has not been on a par with the attention given by the history of science to the idea of objectivity more broadly.<sup>25</sup> The principal effort by a historian to examine the idea has been Robert N. Proctor's *Value-Free Science?*, which ranges across centuries and across both the natural and social sciences. Proctor's work is highly suggestive, and makes two important and related points that this dissertation amply confirms, namely "...that value-neutrality, far from being a timeless or self-evident principle, has a distinctive geography: 'value-freedom' has meant different things to different people at different times," and that "value-neutrality is not a single notion but rather a collection of loosely associated ideals that emerged at different times to serve different social functions...."<sup>26</sup> Proctor connects an array of different doctrines ranging from the Greek distinction between contemplative and practical life to the so-called "devalorization of being," in which reality ceased to appear to early modern thinkers as being infused with purpose and meaning, leading them to locate such purposes and meanings in human beings only. He then treats a wide variety of modern movements and doctrines from classical German sociology to logical positivism, emotivism in ethics, and modern positive economics. Out of these movements he draws further distinct doctrines, such as the following, some of which will recur in our discussion below. The naturalistic fallacy principle—that it is impossible to derive an

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<sup>25</sup> In addition to the literature cited above, American social science has benefited from serious interest in the idea of objectivity; see especially the fine work of Thomas Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority* (Urbana: University of Illinois Press, 1977) and the essays in *Objectivity Is Not Neutrality: Explanatory Schemes in History* (Baltimore: Johns Hopkins University Press, 1998); the widely discussed Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* (Cambridge: Cambridge University Press, 1988); and Mary O. Furner, *Advocacy and Objectivity: A Crisis in the Professionalization of American Social Science, 1865-1905* (New Brunswick: Transaction, 2011 [1975]).

<sup>26</sup> Robert N. Proctor, *Value-Free Science? Purity and Power in Modern Knowledge* (Cambridge: Harvard University Press, 1991), x, 6. Proctor uses the terms value-freedom and value-neutrality interchangeably; we do not use the term value-neutrality here as it has no basis in the German-language discussion, as opposed to later English-language discussions.

“Ought” statement from an “Is” statement—is a logical or even grammatical point that has been particularly important to the value-freedom doctrine. This principle can be used to critique the view that what *is*, or what is natural or actual, is normative or has received the authority and blessing of science. Science can also be seen as a “neutral arbiter” in the social problems that have divided modern society, as it cultivates the right mentality for overcoming division and gaining consensus. Proctor also connects the value-freedom doctrine to subjectivism in economics specifically.<sup>27</sup>

Proctor’s book has performed an important service in surveying the ways in which different doctrines from different eras and socio-political contexts have combined in what might appear to be a unitary idea. He also endeavors to show that these ideas gained ground because they served various social and political functions rather than because they possessed any intrinsic intellectual merit; this sociological reductionism offers insight into the ways in which value-freedom could be embraced for tactical purposes, and fits with a longstanding tradition of treating notions of value-freedom or objectivity as part of the process of professionalization undergone by the social sciences at the end of the nineteenth century.<sup>28</sup> These insights come at a price, however. First, sociological reductionism is not a very plausible approach to intellectual history, as it treats all ideas as operationalized rationales for the attainment of particular socio-political goals, but has trouble differentiating between effective and ineffective ideas. Thus, Proctor claims that the reasons given by advocates of value-freedom were “not sufficient to account for its origins,” and that we must instead consider the adoption of the doctrine as an attempt to gain the kind of “prestige won by physicists and chemists in their mastery over

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<sup>27</sup> Ibid., 6-9.

<sup>28</sup> For the case of German sociology, the best instance of such an approach is Dirk Käsler, *Die frühe deutsche Soziologie 1909 bis 1934 und ihre Entstehungsmilieu* (Opladen: Westdeutscher Verlag, 1984).



nature.”<sup>29</sup> But why exactly were physicists and chemists the beneficiaries of prestige for their scientific work during the nineteenth century? Could it be that creating conventions and practices that delegitimized the intrusion of personal values, beliefs, and ideological convictions had something to do with the success and thus the prestige of natural science? However inflected by politics in the broadest sense, the assignment of prestige in academic research was not and is not simply a random matter of power and hierarchy, and once this is admitted, ideas must be considered on their own merits, too.

Second, because Proctor treats the notion of value-freedom as an ideological doctrine adopted to serve social functions, and surely also because of his admirable wide-lens attempt to trace its whole history, he runs into difficulties explaining the ideas of individual thinkers, often misrepresenting their intentions as well as their actual stated positions. For instance, he makes very perplexing claims such as that one reason social scientists were in favor of “neutrality” (actually, value-freedom) was their “rejection of practical applications” for social science.<sup>30</sup> While such a rejection might characterize those scholars whom Fritz Ringer famously characterized as the “orthodox” German mandarins,<sup>31</sup> with their devotion to humanistic *Bildung*, no advocate of value-freedom would have accepted this claim; indeed, one of the scholars Proctor quotes, Ferdinand Tönnies, even made the notions of “pure” and “applied” sociology basic components of his theory of the discipline. The related claim that that “despite their protests, many of the greatest advocates of neutrality played an important role in the politics of

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<sup>29</sup> Proctor, *Value-Free Science?*, 67.

<sup>30</sup> *Ibid.*, 69.

<sup>31</sup> Fritz Ringer, *The Decline of the German Mandarins: The German Academic Community, 1890-1933* (Cambridge: Harvard University Press, 1969).

their time,”<sup>32</sup> even if it were true, would be a non-sequitur: the value-freedom principle required of its devotees neither neutrality nor abstinence from politics.

Proctor reduces the debates over value-freedom in the German academy to a “reaction against movements *outside* the universities—socialism, the women’s movement, and racialist nationalism.... Neutrality,” he claims, “emerges as a self-conscious ideology of science partly in reaction to political challenges to state power—Marxism, feminism, and social Darwinism—but also as an outgrowth of fears that practical, and specifically industrial, concerns were about to swamp the pursuit of science ‘for its own sake.’”<sup>33</sup> Again, this characterization might perhaps describe the *opponents* of the value-freedom advocates, but could any reader of Weber, Sombart, or Tönnies possibly recognize their views in it? We are simply told that such social movements explain the success of the value-freedom doctrine. Statements such as, “The National Liberal party enjoyed support in Germany in the early years of Bismarck’s rule (1878-1891)”<sup>34</sup> may incline the reader toward skepticism about the trustworthiness of Proctor’s guide to the historical context of these debates in imperial Germany. But even with that qualm put aside, Proctor’s statements cannot survive a shave from Occam’s razor. Even among the value-freedom advocates considered in this dissertation, a wide variety of views on politics and social organization prevailed, from the conservative liberal Menger, through moderate National Liberals like Jellinek (and perhaps Weber) to the left-liberal Kantorowicz and the social-democratically inclined Tönnies and Radbruch. Rather than trying to fit them into a Procrustean

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<sup>32</sup> Ibid., 70. Proctor makes the further claim, without evidentiary backing, that “The scientist was not to bother himself with political affairs. His job was to follow the truth: it was not his place to challenge the politics of his patrons.” Ibid., 84. All of the value-freedom advocates we will examine below were involved with political matters at some point in their careers. Proctor’s reference to “patrons” is particularly mystifying: German professors were state employees, and those who were closest to the state and academic powerbrokers like Friedrich Althoff of the Prussian ministry of education were the *opponents* of the value-freedom advocates.

<sup>33</sup> Ibid., 70.

<sup>34</sup> Ibid., 101.

bed of opposition to modernity, it is better to explain their methodological commitments on the basis of their methodological arguments.

Such a practice would have saved Proctor from interpretations that demonstrate an unfamiliarity with the writings and views of the value-freedom advocates. In quoting from a passage in Tönnies' address to the first meeting of the German Sociological Society, which we will analyze below, Proctor claims Tönnies believed that scientific sociology "was neutral not in the abstract but rather in opposition to certain political ideas." When Tönnies mentioned that sociology in and of itself can be neither in favor of nor against socialism, or the women's movement, or the "mixing of the races," Proctor inadvertently demonstrates the importance of avoiding the naturalistic fallacy by summarizing Tönnies' position thus: "Neutrality, in other words, was proposed in opposition to socialism, the expansion of women's rights, and the mixing of the races."<sup>35</sup> Not only does this interpretation cleave against the transparent meaning of the text, but it is diametrically opposed to the positions on these issues that Tönnies personally held, as we shall see.

This dissertation makes the assumption that statements on questions of methodology should be treated with respect as consciously and rationally held arguments, particularly when they are the result of considerations spanning a scholar's entire career. Of course, others have discussed the value-freedom commitments of turn-of-the-century German social scientists in this way as well, although relatively few of them have been historians. One effort dating to the 1950s deserves particular mention: the chapter on the origins of "scientific value relativism" in Arnold Brecht's *Political Theory*.<sup>36</sup> Brecht's chapter brings together in very brief compass the considered views of key supporters of value-freedom among German philosophers and jurists,

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<sup>35</sup> Ibid., 91-92.

<sup>36</sup> Arnold Brecht, *Political Theory: The Foundations of Twentieth-Century Political Thought* (Princeton: Princeton University Press, 1959), Chapter 6, esp. 207-240.

placing emphasis on the distinction between Is and Ought and stating clearly that Weber himself would have been the first to acknowledge that he was not the originator of the doctrine.<sup>37</sup>

Probably owing to Brecht's own training as a jurist in the same milieu as those about whom he wrote—he was a younger contemporary of Radbruch's in Lübeck—his chapter is the only discussion of value-freedom that considers the jurists Jellinek, Kantorowicz, Radbruch, and Kelsen in the same context as Weber and the neo-Kantian philosophers who are normally credited with establishing it.<sup>38</sup> Although pioneering in this way, it provides only the briefest of treatments, however.

More attention has been paid to the specific dispute over value judgments in political economy known as the *Werturteilsstreit*, which took place in the Verein für Sozialpolitik, Germany's premier social scientific body, in 1909, with further discussions continuing until the outbreak of First World War.<sup>39</sup> The principal antagonists in this debate were Max Weber and the historical economist Gustav Schmoller (1838-1917), with Weber deriving support from his contemporary, Werner Sombart, and Schmoller supported by a range of economists old and young. Weber defended the value-freedom position in opposition to Schmoller's "ethical" political economy, and we will outline his stance in this chapter and Schmoller's in the following chapter. Heino Heinrich Nau has acutely chronicled the course of the dispute in German political economy (and its intellectual antecedents), identifying the positions taken even by minor figures in the discipline. Instead of duplicating his research, therefore, this dissertation

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<sup>37</sup> *Ibid.*, 215.

<sup>38</sup> *Ibid.*, 220-21, 231-238.

<sup>39</sup> See especially Heino Heinrich Nau, "Zwei Ökonomien: Die Vorgeschichte des Werturteilsstreits in der deutschsprachigen Ökonomik," in Nau, ed., *Der Werturteilsstreit: Die Äusserungen zur Werturteilsdiskussion im Ausschuss des Vereins für Sozialpolitik (1913)* (Marburg: Metropolis, 1996), 9-64. Several other brief considerations exist in older literature: Christian von Ferber, "Der Werturteilsstreit 1909/1959: Versuch einer wissenschaftsgeschichtlichen Interpretation," *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 11 (1959), 21-37; Dieter Lindenlaub, *Richtungskämpfe im Verein für Sozialpolitik* (Wiesbaden: Steiner, 1967), 433-443, which is surprisingly unreliable in an otherwise fine study; Nereu Feix, *Werturteil, Politik und Wirtschaft: Werturteilsstreit und Wissenschaftstransfer bei Max Weber* (Göttingen: Vandenhoeck & Ruprecht, 1978), 16-33.

aims to supplement it by a carefully analyzing important proponents of the value-freedom doctrine – proponents who themselves did not participate directly in the *Werturteilsstreit* but whose contributions should nonetheless not be overlooked.

## **I. The Argument**

Despite operating in different disciplines, and despite their widely variant personal and intellectual backgrounds, Menger, Tönnies, Jellinek, Kantorowicz, and Radbruch held similar attitudes not only about the value-freedom doctrine itself but about social science generally. They also faced a common problem as a result of the way in which they conceptualized the human world that their disciplines were seeking to explain.

Broadly speaking, we can identify three major commonalities. First, all five aimed to establish that explanations in the social sciences must make reference to the subjective meanings, intentions, and values of individual human actors. They were in this way—much like others in the tradition derived from German historicism—opponents of nineteenth-century positivism. Positivists like the influential statistical-determinist historian Henry Thomas Buckle tended to believe that scientific work could achieve objectivity by ignoring the subjective level of human intentions and values and dealing only with predictable aggregate behaviors. Not even Tönnies, among our figures the most sympathetic to positivism, could accept such an orientation. In a way, then, it was ironically essential to the advocates of value-freedom that they insisted on the relevance to social scientific work of carefully examining human values, *not* being free of them. And yet, their notion of the proper function of social science separated them from any purely historicist perspective because of its emphasis on explanation rather than on interpretive

understanding alone. To emphasize the combination of this focus on both subjective meanings and values *and* on the effort to explain actions in terms of regularities, we will sometimes refer to this approach as “interpretive social science.”<sup>40</sup>

Second, they all accepted the view that human values or valuations were subjective in the sense of being non-rational and incapable of public demonstration. Values were a matter of contingent individual commitment based on will or emotion and could not be established or justified by reasoned argument. This perspective in turn separated the value-freedom advocates from the traditional moral-political sciences such as the German *Staatswissenschaften*, which aimed directly at promoting the public welfare.

Third, they came to accept what we will designate here as the “value-freedom complex,” to refer to the notion, as emphasized by Proctor, that value-freedom was composed of a number of potential constituent parts. Among these parts, the most prominently featured for the social scientists considered here were the distinctions between theory and practice, Is and Ought, and fact and value, and the conviction that a normative science claiming to determine ultimate values was an impossibility, to be replaced by the ideal of a science that determined the means to given ends. Variations among the individual thinkers relate to the importance they assigned to particular elements in this value-freedom complex.

It is important to the argument here that it was a *combination* of these three commonalities – the need to refer in the social sciences to subjectivity, the recognized subjectivity of human values, and the value-freedom complex – which led to acceptance of the

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<sup>40</sup> That is, interpretation is combined with the scientific emphasis on (largely causal) explanation. Although this phrase might lead to confusion with the employment of hermeneutic methods in social science, sometimes known as interpretive social science, it is used here in preference to German-language alternatives like “cultural science,” (*Kulturwissenschaft*) “human science,” (*Geisteswissenschaft*) and “science of man” (*Wissenschaft vom Menschen*) which can be equally confusing because of their very particular meanings in the context of late nineteenth- and early twentieth-century Germany. The Weberian “science of reality” (*Wirklichkeitswissenschaft*) might be best but is simply too vague and awkward in English.

idea of “value-free” science. In particular, without the second commitment, to value subjectivism, there was no reason why a separation of Is and Ought or theory and practice would necessarily lead to a limitation of social science to a positive rather than a normative function—one might ever so sharply differentiate between what is and what ought to be and yet believe that there was a clear and objective moral law that impelled the social scientist to promote “the good.” Only with the emergence of all three of these common commitments as “live options” did value-freedom first become possible in what we think of as the Weberian sense. Alongside it, however, came the inevitable problem of objectivity.

When connected with value subjectivism, the conviction that social science must take genuine notice of individual values, intentionality, and other mental phenomena in its explanations raised the problem of justifying scientific findings on several levels. At the first level, the social sciences would be little better than a kind of “glass bead game” or form of conceptual play if they did not provide guidance to people in their interactions with the rest of the human world. Recognizing the fact that the scholars’ traditional prerogative of normative guidance was threatened by the subjectivity of values, the value-freedom advocates used their doctrine to salvage a role for the social sciences in providing policy or legal norms *as long as the ultimate goals were externally given to the scholar*, who could supply the relevant factual knowledge to realize these goals most effectively. Yet factual knowledge, too, was threatened: confronted with a mass of subjective mental states and valuations with no internal criteria for judging importance or irrelevance, the social scientist had to develop some other sort of theoretical criteria for fishing out facts from the world’s never-ending stream. These criteria were subject to the same philosophical scruples, and had to be defended; the impending infinite regress posed a problem that could be solved only by means of a form of circular reasoning that

closed the chain of justification into a loop, or by a full-stop, “Here I stand” conviction, itself ungrounded. The danger to a coherent notion of objectivity in this process was apparent.

Our protagonists thus had a common, or at least closely related, set of arguments and problems to address, with variations according to their disciplines. They also tended to share certain values and convictions themselves, above all a preference for the cultured *individual* (true even of the *gemeinschaftlich*-oriented Tönnies and the social democratic Radbruch) and for pluralism combined with relativism and tolerance. Except for Menger, they had strong nominalist tendencies; and even Menger, despite his Aristotelianism, could show signs of it, particularly in his rejection of the “real” nature of organic or collective entities. A perhaps surprising commonality is the lack of influence of Nietzsche, often thought to be one of the determinative influences on the modern conception of values in a godless world (as it was for all of these figures). But it is equally important to emphasize their divergent intellectual origins, politics and even personality attributes, not to mention the discipline-specific problems that they faced. All three of the jurists were shaped by neo-Kantianism, but we show that in each case, they came to important conclusions leading in the direction of value-freedom before or without neo-Kantian arguments. Menger, as just observed, was an Aristotelian of sorts, in the Austrian philosophical tradition. Tönnies’ thought was principally shaped by seventeenth-century philosophy, above all by that of Thomas Hobbes. We have seen that the range of their political opinions ranged from the center-right to moderate socialism, and in most chapters we give some consideration to the ways in which their own biographies shaped the convictions they held about as personal a matter as “ultimate” values.

As to the ways in which their scholarly training played into their commitment to value-freedom, it is a novel feature of this dissertation that it examines their methodological arguments



in light of the content of their professional work, particularly as the latter has a bearing on understanding their views of value, values, and normativity. This emphasis highlights both the contingency of the process by which they developed their views on values and value-freedom, and also suggests how many different potential avenues there were toward the doctrine. An ancillary consideration raised by this procedure is the question of whether the common concept of “value” may be used to unlock similarities between very different problems in different disciplines, such as exchange value in economics, the validity of judicial pronouncements, and the changing structure of social authority.

One further particularity of the argument is that the legal sciences deserve to be considered here among the social scientific disciplines as part of the soil from which value-freedom grew. Often ignored in treatments of social science problems, law has always been an obvious source of reflection on the problems of normativity. It has raised its own characteristic concerns while often employing social scientific methods and facing the same array of problems as the latter, as our discussion of Jellinek and Kantorowicz in particular will show. Like the “practical science” of economic policy in Menger, or as in the question Weber and Tönnies ask about what tasks science can in fact perform when confronting values, law itself must deal with normative statements and it must even prescribe—yet the legal practitioner, even when a judge, cannot simply assert his or her arbitrary will, but must approach the law and its requirements as matters of fact.

The five figures considered here played an important role in raising awareness of the limits of social science in the face of value questions, and of the need for a recognition that the theoretical and the practical are connected but analytically separable. In some ways, then, their achievement was very similar to Weber’s, and often involved the expression of what we now

take to be Weberian ideas *before* Weber enunciated them—sometimes long before. We may credit them with pursuing a non-positivist social science that nevertheless insisted on recognizing the difference between research and advocacy. Still, as we shall see in the individual chapters, they largely failed to create solutions to, or often even to recognize, the difficulties created for their positions by the objectivity problem. In the end, all but one of them fell back at least implicitly on the ascetic ideal, even after leaving positivism behind, in their attempts to take subjectivity into account without threatening the objectivity of their results. Only Jellinek shared with Weber a different kind of solution, which did not fall back upon injunctions to purge oneself of all bias.

Modern thought is characterized by dualisms like the one involving subjectivity and objectivity, and it appears at least to many to be antinomian, involving equally necessary but contradictory claims that are impossible to reconcile. Successfully reconciling subjectivity and objectivity at the level of conceptual thought would be a difficult feat indeed, and it may be that taking practical measures may be the only option for securing something like objectivity. It is the originality of Jellinek and Weber to set out a process-oriented model of intersubjectivity to substitute for the objectivity ideal, in which science does not depend on purging oneself of impure motives but instead on the ability of a competitive selection process composed of countless individuals presenting their findings to be checked by others. Intersubjectivity remains on one side of the dualism in question, but a process-oriented conception entails that results are tested both by others' reasoning and by those results' staying power in an external world in which, as Weber put it, "the light of the great cultural problems moves on."<sup>41</sup> If the attention devoted to Weber as a theorist of value-freedom is to rest on more than the greater extensiveness

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<sup>41</sup> Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, 5<sup>th</sup> ed., ed. Johannes Winckelmann (Tübingen: Mohr, 1982), 214; *The Methodology of the Social Sciences*, trans. and ed. Edward Shils and Henry Finch (New York: Free Press, 1949), 112.

of his essays than those of the theorists considered here, it must be as the scholar who—perhaps along with Jellinek—most readily saw the need for a non-“ascetic” solution to the problem of objectivity.

Ultimately, the purpose of this dissertation is to resuscitate the work of a number of important and intriguing but relatively underappreciated thinkers by treating their concerns and arguments within the contexts in which they arose, rather than as responses to recent problems. It is hoped that the reader will gain familiarity with the problems considered by these thinkers and by their struggles with solutions, as well a recognition of why Weber might indeed be seen as standing on their shoulders. The value-freedom tradition was *not* a justification of the removal of values from social scientific discussion, even if the instability of these figures’ attempts to hold both subjectivity and objectivity in balance subsequently led those who were confused by the name and attracted by a new positivist current to reconceive their work as really *value-free*.

In order to determine the proper place and originality of our five protagonists, we must begin with some basic background in the thought of the neo-Kantians Wilhelm Windelband and Heinrich Rickert, and of Max Weber.

## **II. A Primer on Southwest German Neo-Kantianism**

Neo-Kantianism in its several forms was the dominant philosophical tradition in Germany in the latter half of the nineteenth century and for much of the beginning of the twentieth.<sup>42</sup> The neo-Kantian revival that succeeded the heyday of Hegelianism in many German philosophical faculties was, at least initially, focused more on pure logic, natural science, and the

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<sup>42</sup> The classic survey of German philosophy, Herbert Schnädelbach, *Philosophy in Germany, 1831-1933* (Cambridge: Cambridge University Press, 1984), is not always lucid but remains the best guide to this period.

history of philosophy than on the cultural issues that exercised professors in the other *Geisteswissenschaften* or “human sciences.” But by the 1880s, another “school” of neo-Kantianism had begun to arise in the southwestern universities of Freiburg, Heidelberg, and Strassburg. Its principal constituents, led by Wilhelm Windelband and, somewhat later, Heinrich Rickert, were fascinated by the methodological problems raised by the need to combat the contemporary challenge to the German historical tradition from Anglo-French positivist social scientists, who sought lawful regularities instead of the hermeneutic understanding of historically-situated individuals and collective groups—the latter, too, such as nations, seen as having a kind of historically relative individuality.<sup>43</sup>

Windelband and Rickert were certainly not the first philosophers to address themselves to these questions. They had been preceded by Wilhelm Dilthey, whose *Einleitung in die Geisteswissenschaften* appeared in 1883, a book that H. Stuart Hughes once suggested to be “the first thoroughgoing and sophisticated confrontation of history with positivism and natural science.”<sup>44</sup> Dilthey had aimed to ground the historicism of German social scientific practice by establishing that the natural and human sciences dealt with two ontologically different realms, nature and mind (*Geist*), and that the latter realm could only be understood “from the inside” by

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<sup>43</sup> Thomas E. Willey, *Back to Kant: The Revival of Kantianism in German Social and Historical Thought, 1860-1914* (Detroit: Wayne State University Press, 1978), 131-32. Klaus Christian Köhnke, *The Rise of Neo-Kantianism: German Academic Philosophy Between Idealism and Positivism* (Cambridge: Cambridge University Press, 1991), an exhaustive but not always philosophically nuanced portrayal, focuses on the period before 1880 and includes minimal consideration of the southwest German school. The German historical tradition and the challenge from positivism are still best approached through Georg G. Iggers, *The German Conception of History*, rev. ed. (Middletown, Conn.: Wesleyan University Press, 1983).

<sup>44</sup> H. Stuart Hughes, *Consciousness and Society: The Reorientation of European Social Thought, 1890-1930*, rev. ed. (New York: Vintage, 1977), 194.

interpretive reconstruction.<sup>45</sup> But his work did not initially provoke a great deal of debate, and it was left to Windelband to reopen the issues in the 1890s.<sup>46</sup>

In his 1894 Rectoral Address at the University of Strasbourg, entitled “*Geschichte und Naturwissenschaft*,” Windelband disputed Dilthey’s claim that the difference between the *Naturwissenschaften* and the *Geisteswissenschaften* lay in the subject matter proper to each. The “methodological procedure” of psychology, for instance, he reminded his audience, “is exclusively the method of the natural sciences.”<sup>47</sup> He suggested instead that any taxonomy of the sciences be based on a difference in method, not in the subject of study.<sup>48</sup> But he concurred with Dilthey that it would be a grave mistake to restrict scholars to the methods employed by the natural sciences alone. Where it had been tried out, he quipped, this positivist program of attempting to establish inductive laws governing *all* aspects of history and cultural life had produced “a few trivial generalities which can be excused only on the basis of a careful analysis of their numerous exceptions.”<sup>49</sup> Scholars should recognize that both the natural scientific method and the method represented by German historicism had their proper place, determined by their success in achieving their respective goals. Acknowledging the value of the natural scientific approach, which aims to “establish, collect, and analyze facts only...for the purpose of understanding the general nomological relationship to which these facts are subject,” Windelband argued that the *Geisteswissenschaften* “have a distinctively different purpose: they provide a complete and exhaustive description of a single, more or less extensive process which

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<sup>45</sup> See, most recently, Hans-Ulrich Lessing, *Wilhelm Dilthey: Eine Einführung* (Stuttgart: UTB, 2011); and in English, Michael Ermarth, *Wilhelm Dilthey: The Critique of Historical Reason* (Chicago: University of Chicago Press, 1978).

<sup>46</sup> Hughes, *Consciousness and Society*, 190. It was favorably received by the historical economist Gustav Schmoller in the same 1883 book review as the latter used to dismiss the methodological work of Carl Menger, igniting the *Methodenstreit*. See Chapter 2 below.

<sup>47</sup> Wilhelm Windelband, “History and Natural Science,” trans. Guy Oakes, *History and Theory* 19:2 (Feb. 1980), 174.

<sup>48</sup> *Ibid.*, 174.

<sup>49</sup> *Ibid.*, 181-82.

is located within a unique, temporally defined domain of reality.”<sup>50</sup> The first method he termed “nomothetic,” the second, “idiographic.”<sup>51</sup> Windelband thus defended the historicist concern with individuality from positivist attack by granting that both the nomothetic and idiographic methods had different and equally legitimate goals, and that neither could replace the knowledge obtained through the other method with its own type of knowledge.<sup>52</sup>

Clearly more interested in the idiographic than the nomothetic, however, Windelband went on to outline an initial analysis of the former method as it was applied in the human sciences. Here he made his most original, if complex, contribution to the methods debate,<sup>53</sup> one that is relevant to our purposes here. Windelband argued that we could call something knowledge if and only if it stood in relation to a *value*, a norm which determined that we *ought* to believe it; it was a condition for the possibility of knowledge that one could postulate a “normal consciousness” above the level of ordinary consciousness and not susceptible to relativistic objections, which set norms for the good, the true, and the beautiful, as if in an absolute way.<sup>54</sup> For Windelband rejected value objectivism, arguing that value itself “never belongs to objects in themselves alone, as a property, but always only in relation to an evaluating consciousness”; consequently it was evaluative *judgment*, rather than values, that must be secured against the threat of relativism by this kind of transcendental argument from the possibility of knowledge.<sup>55</sup>

Windelband treated theoretical judgments, which is to say statements about truth or falsity, and

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<sup>50</sup> Ibid., 174.

<sup>51</sup> Ibid., 175.

<sup>52</sup> The best general account in English of Windelband’s thought overall, and specifically with regard to the ideas outlined in the Rectoral Address, is Charles Bambach, *Heidegger, Dilthey, and the Crisis of Historicism* (Ithaca: Cornell University Press, 1995), Ch.2, esp. 66-81.

<sup>53</sup> Iggers, *German Conception*, 148.

<sup>54</sup> See Schnädelbach, *Philosophy in Germany*, 181-182; Bambach, *Heidegger, Dilthey*, 76-77; Willey, *Back to Kant*, 136-137; on the idea of a “normal consciousness,” see Marion Heinz, “Normalbewusstsein und Wert,” in Marion Heinz and Christian Krijnen, eds., *Kant im Neukantianismus* (Würzburg: Königshausen & Neumann, 2007), 75-90. Strictly speaking, to say that these norms were “absolute” is to ontologize them, which Windelband wanted to avoid: hence the use of transcendental argument to establish a *postulate* of normal consciousness rather than a claim to some kind of knowledge of supra-physical reality.

<sup>55</sup> Ibid. Windelband quoted in Schnädelbach, *Philosophy in Germany*, 181.

evaluative judgments equally as valuational (“axiological”), regarding truth as a value much as any other.<sup>56</sup> Thus, against the positivists, Windelband insisted that even theoretical judgments about nomothetic laws must make reference to value, even if it was the universal and necessarily posited value of general truth. The unique individuality sought by the idiographic disciplines, however, necessarily lacked generality, and in consequence, to establish knowledge in the field of “particular realities,” the social scientist must point to some other type of value—no less universal, but not the kind inhering in a general apodictic judgment.<sup>57</sup> Since, as Windelband put it in another work, “all other values are known to us only in such structures as in their empirical appearance belong to the life of man, and relate to what man has elaborated from his experience of the surrounding world,” the idiographic method can produce knowledge only when it relates the individuality being described to one of these values common to the human experience of life.<sup>58</sup> But Windelband did not describe these values beyond calling them “the structures of civilized life,” and he implicitly assumed that all human beings share them. He thereby remained set against historicist relativism, positing universal, formal values in judgments of the good and the aesthetic as much as in theoretical judgments.<sup>59</sup> The complexities of Windelband’s attempt at a transcendental grounding of universally valid values are less important here than his use of the term “values,” which he derived from his teacher Hermann Lotze<sup>60</sup>: by employing it he thus helped to ensure that the concept of values was introduced directly into considerations of historical and social scientific methodology.

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<sup>56</sup> Ibid., 183.

<sup>57</sup> See especially Bambach, *Heidegger, Dilthey*, 74-79.

<sup>58</sup> Wilhelm Windelband, *An Introduction to Philosophy*, trans. Joseph McCabe (New York: Henry Holt & Co., 1921), 205.

<sup>59</sup> Bambach, *Heidegger, Dilthey*, 79.

<sup>60</sup> Schnädelbach, *Philosophy in Germany*, 169-181.

Heinrich Rickert, a student and then colleague of Windelband, later clarified a point of confusion in his mentor's argument, even as he developed the main points of the Rectoral Address in two books of the 1890s and 1900s. He agreed with Windelband that the sciences should be classified by method, and that the two branches were represented by the nomothetic and idiographic approaches.<sup>61</sup> The two methods had entirely different goals and were thus, he thought, "in radical logical opposition."<sup>62</sup> The nomothetic sciences sought out laws or generalizations, and the idiographic sought to describe individualities in their full uniqueness.<sup>63</sup> But Rickert wondered in what way it could be said that the idiographic method really captured individualities, as Windelband had claimed. If we assume, as Rickert did, that reality is a sort of continuous flux, an infinitely differentiable "heterogeneous continuum," which is "irrational" in the neo-Kantian sense that any pattern in the world is not inherent but imposed upon it by the human mind, then any attempt to employ a scientific method must necessarily be "a process involving the *simplification* of the actual multiplicity of reality itself."<sup>64</sup> This is just as true of the idiographic as of the nomothetic method: both offered a selective, schematized *picture* of reality through the process of concept-formation. They differed only in the way they simplified, with the nomothetic natural sciences producing their kind of order by discerning regularities or *generalizing*, and the idiographic or cultural sciences seeking out in contrast the "particular and individual."<sup>65</sup> But if reality in all its particularity was "irrational," if it served as the limit to

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<sup>61</sup> Heinrich Rickert, *Kulturwissenschaft und Naturwissenschaft*. English trans., George Reisman, *Science and History* (Princeton: D. Van Nostrand Co., 1962), 15. Rickert preferred the terms "natural scientific" and "cultural scientific" to "nomothetic" and "idiographic," but on technical grounds unimportant here.

<sup>62</sup> Heinrich Rickert, *Die Grenzen der naturwissenschaftlichen Begriffsbildung* (Tübingen: Mohr, 1902). English trans., Guy Oakes, *The Limits of Concept Formation in Natural Science* (Cambridge: Cambridge University Press, 1986), 35.

<sup>63</sup> Rickert, *Science and History*, 34; 46.

<sup>64</sup> *Ibid.*, 33. All italics in the following quotations are Rickert's own. See also Rickert, *Limits of Concept Formation*, 52; Willey, *Back to Kant*, 145; Bambach, *Heidegger, Dilthey*, 94-95; Guy Oakes, *Weber and Rickert: Concept Formation in the Cultural Sciences* (Cambridge, Mass.: MIT Press, 1988), 53-56.

<sup>65</sup> Bambach, *Heidegger, Dilthey*, 98-99.



concept formation which by definition must simplify, how could Rickert salvage the claim that “individuality is, notwithstanding, *preserved* in the process” of idiographic conceptualization?<sup>66</sup>

Rickert drew on and clarified Windelband’s reference to values in his solution. The human sciences must look to culture and cultural values for “a *principle for the selection of the essential* aspects of reality.”<sup>67</sup> It was not the task of the *Geisteswissenschaften* to relate just any human phenomenon to a value or set of values, as Windelband had implied. Rather, the social scientist should use cultural values to determine which individualities were *significant*.<sup>68</sup> In other words, recognizing the impossibility of conceptually describing an “irrational” individuality in all its uniqueness, Rickert argued that we should pick out the most significant details of the area of history or society under study by the degree to which they reflected certain values. In his best known example, he pointed out that in a discussion of carbon formations, we would lack interest in pieces of coal, though they are certainly separate individualities, while diamonds would attract our attention because we attach value to them.<sup>69</sup> In the same way, only historical phenomena that reflect values are worthy of attention.<sup>70</sup> Rickert claimed that this position did not limit the objectivity of the human sciences.<sup>71</sup> For their task was to *relate* facts to values (*wertbeziehen*), not to *evaluate* (*werten*) facts.<sup>72</sup> But this claim of course presumed that there was an objectively “given” set of values on which all historians and social scientists could agree as the relevant set for their work of value-relation. Rickert himself thought that there was such a “common core of cultural values on which all or at least most civilized men could agree,” as one historian of neo-

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<sup>66</sup> Rickert, *Science and History*, 71.

<sup>67</sup> *Ibid.*, 83.

<sup>68</sup> *Ibid.*, 81.

<sup>69</sup> Rickert, *Limits of Concept Formation*, 82-84. Bambach, *Heidegger, Dilthey*, 100.

<sup>70</sup> Rickert, *Science and History*, 83.

<sup>71</sup> Bambach, *Heidegger, Dilthey*, 104-108.

<sup>72</sup> Rickert, *Science and History*, 89. See also Oakes, *Weber and Rickert*, 78-90, for a good summary.

Kantianism puts it.<sup>73</sup> Still, the truly objectively valid values needed to defend Rickert's system against relativism could not be identified by such considerations. These were not and could not be the ordinary values of the empirical world, which could clearly differ across times and cultures, but formal, unconditionally valid values to which reference must be made by any empirical value claim: again, by transcendental argument, Rickert attempted to demonstrate that knowledge (truth) and other values claims must presuppose objective values.<sup>74</sup>

### III. Value-Freedom in Max Weber's Methodology of Social Science

Weber's methodological writings owed a great debt to Rickert.<sup>75</sup> Even Fritz Ringer, who is at pains to champion Weber's intellectual independence from his colleague, admits that "Weber followed Rickert in the overall framework of his position."<sup>76</sup> This is hardly to say that Weber parroted his neo-Kantian predecessors, or that his conclusions about the role of values in scholarship or in education were the same as theirs or those of the "mandarins" who bemoaned

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<sup>73</sup> Willey, *Back to Kant*, 147.

<sup>74</sup> Oakes, *Weber and Rickert*, Ch.3, esp. 105ff.

<sup>75</sup> Weber's debts to Rickert have been a contentious issue in Weber studies; here I follow scholars like Guy Oakes, Wolfgang Schluchter, and Stephen P. Turner rather than Wilhelm Hennis and others who downplay the role of Rickert. This specific issue aside, I regard Hennis's efforts at historicizing Weber, alongside some of the work of Friedrich Tenbruck and Wolfgang Mommsen, as the best approach to understanding Weber's work. See Hennis, *Max Webers Wissenschaft vom Menschen* (Tübingen: Mohr Siebeck, 1996); Tenbruck, *Das Werk Max Webers: Gesammelte Aufsätze zu Max Weber* (Tübingen: Mohr Siebeck, 1999), esp. "Die Genesis der Methodologie Max Webers"; Mommsen, *Max Weber and German Politics, 1890-1920*, trans. Michael Steinberg (Chicago: University of Chicago Press, 1984); and Mommsen and Jürgen Osterhammel, eds., *Max Weber and his Contemporaries* (London: Unwin Hyman, 1987). See also the recent work of Lawrence Scaff cited above, and Scaff, *Fleeing the Iron Cage: Culture, Politics, and Modernity in the Thought of Max Weber* (Berkeley: University of California Press, 1989).

<sup>76</sup> Fritz Ringer, *Max Weber's Methodology: The Unification of the Cultural and Social Sciences* (Cambridge: Harvard University Press, 1997), 45. On the deficiencies of Ringer's book (including Ringer's attempt to distance Weber from Rickert, despite much evidence of Weber's dependence on the latter in many matters of methodology), see the symposium in *International Journal of Politics, Culture and Society* 12:2 (1998), some of which, however, inaccurately represents the book as having little merit, particularly in the remarkably hostile review by the important Weber scholar Stephen P. Turner.

the advent of specialization and the decline of the ideal of individual cultivation or *Bildung*.<sup>77</sup>

But, however he differed from these contemporaries, Weber's position on the proper place of values in both science and teaching was also shaped by the historicist interest in accounting for the unique and individual in history, and by the Rickertian ideas of the irrationality of reality and the use of value-relation.<sup>78</sup>

In this introduction, we cannot begin to consider the entire range of methodological problems taken up by Weber during the years after 1903, let alone position his work on such problems in the context of his scholarship as a whole, as we attempt to do in the case of his contemporaries in the chapters that follow. Weber's methodological work itself has been studied to such a degree of intensity, moreover, that it would be superfluous to do so; a number of high-quality surveys and studies already exist and more definitive work on his methodological views, including on the question of value-freedom, must await the publication of the final volumes of the *Max Weber Gesamtausgabe*, which contain his writings on method and the associated scholarly apparatus.<sup>79</sup> Nonetheless, it is important to understand the basic features of Weber's views on value-freedom in order to situate and assess the work of the figures studied in this dissertation, in part simply because Weber's writings have become the standard treatment of topics that, as we will see, were widely shared in his intellectual context. Here we will principally focus on the features of his methodology which show him to be an adherent of what

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<sup>77</sup> The best interpretation of concerns over specialization remains Ringer, *Decline of the German Mandarins*.

<sup>78</sup> Wolfgang Schluchter, *Handlung, Ordnung, Kultur: Studien zu einem Forschungsprogramm im Anschluss an Max Weber* (Tübingen: Mohr Siebeck, 2005), 14-15. A thorough and highly technical demonstration of the use to which Weber put Rickert's philosophy is Peter-Ulrich Merz, *Max Weber und Heinrich Rickert: Die erkenntniskritischen Grundlagen der verstehenden Soziologie* (Würzburg: Königshausen & Neumann, 1990).

<sup>79</sup> The best studies of Weber's methodology include Hans Henrik Bruun, *Science, Values and Politics in Max Weber's Methodology*, new ed. (Aldershot: Ashgate, 2007); Oakes, *Rickert and Weber*; Sven Eliaeson, *Max Weber's Methodologies*, which attempts to set Weber in his original context in the manner in which this dissertation treats several of his peers; and the studies in Gerhard Wagner and Heinz Zipprian, eds., *Max Webers Wissenschaftslehre* (Frankfurt: Suhrkamp, 1994). See also Jay A. Ciaffa, *Max Weber and the Problems of Value-Free Social Science: A Critical Examination of the Werturteilsstreit* (Lewisburg, PA: Bucknell University Press, 1998).

we have designated above as “interpretive social science”; indicate his value subjectivism and its threat to the objectivity of social science, alongside his proposed solution to that problem; and conclude by outlining his views on what a “value-free” social science can accomplish for human beings pursuing their ends, whether these include social policy or the search for normative guidance in university studies.

A legally trained economist of the historical school, not a philosopher, Weber did bring a different perspective from the neo-Kantians’ to bear on questions of methodology through his practical work as a scholar. Where Rickert had been regarded by many as excessively formalistic,<sup>80</sup> Weber had done significant empirical work by the time he first explicitly took up methodological questions in 1904. In the 1880s and 1890s before his well-known personal crisis, he had written on Roman agrarian history, farm labor problems east of the Elbe, and on the stock exchange, among other things.<sup>81</sup> Even his methodological writings were usually prompted by specific and concrete needs. His pivotal 1904 essay “‘Objectivity’ in Social Science and Social Policy,” for instance, served as a statement of Weber’s position as the co-editor (with Werner Sombart and Edgar Jaffé) of the *Archiv für Sozialwissenschaft und Sozialpolitik*, a major social scientific journal.<sup>82</sup> This essay, along with “The Meaning of ‘Value-Freedom’ in Sociology and Economics” (1913/17), contains Weber’s central writings on the value question as well as other considerations on method, and will be the focus of our discussion.

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<sup>80</sup> Friedrich Meinecke, for instance, thought that Rickert’s formulations had little enough to do with historians’ actual practice, which, he claimed, required evaluation of the historical subject rather than simply value reference. See Bambach, *Heidegger, Dilthey*, 110-11.

<sup>81</sup> On Weber’s early work, see Scaff, *Fleeing the Iron Cage*, chapters 1 and 2; Knut Borchardt, “Weber’s Writings on the Bourse,” *Max Weber Studies* 2:2 (2002), 139-162. Reinhard Bendix, *Max Weber: An Intellectual Portrait* (Garden City, N.Y.: Doubleday, 1960), though now very old, offers an analytical summary of the early work: see Ch. 2.

<sup>82</sup> Marianne Weber, *Max Weber: A Biography*, trans. and ed. Harry Zohn (New Brunswick: Transaction, 1988), 277-279. During the composition of the “Objectivity” essay, still struggling with his sleep and concentrative powers, Weber “eats a Camembert every night,” reports Marianne, “but is quite pleased that he has accomplished this thing”: 279.

Weber's main methodological problem was, essentially, finding a way to combine the strengths of the German historical tradition of interpretive *Geisteswissenschaft* with the search for generalizations and causal explanations that were the strengths of what Windelband had labeled the nomothetic approach. He was neither historicist nor positivist, and these designations are not especially helpful in understanding his thought; instead, he aimed to practice "interpretive social science." That is, he insisted on taking the subjective meanings, intentions and values of individual agents as basic data for social scientific explanation, and he certainly did not aim at the discovery of any transhistorical laws of human society or economy, but he also intended to explain particular historical and cultural formations and even situationally determined patterns of individual action. For Weber, the study of social phenomena past and present could not be limited to a mere description of purportedly inexplicable (because free-willed) "personalities" and historical individuals, nor could the scholar presume that human beings followed laws as precise as those of much marginalist economics.<sup>83</sup> Instead, he drew on his legal training to balance the equally necessary consideration of causation and teleology, strict determination, and subjective intention through the study of action in particular cases, in the course of attempting to find an "adequate" causal explanation.<sup>84</sup> As Fritz Ringer put it, Weber is best characterized as "at once a causalist and a sophisticated interpretationist...[who] simultaneously renewed and transformed his methodological heritage."<sup>85</sup> In this interpretation, the core of Weber's contribution to social scientific method was his conception of "singular causal analysis," a set of techniques for determining without the application of rigid "laws" why one particular event or action or idea had come about, and not another. And, indeed, Weber's introduction of causal

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<sup>83</sup> Eliaeson, *Max Weber's Methodologies*, 35-38.

<sup>84</sup> Stephen P. Turner and Regis A. Factor, *Max Weber: The Lawyer as Social Thinker* (London: Routledge, 1994), esp. 31ff. and Ch.6.

<sup>85</sup> Ringer, *Max Weber's Methodology*, 6.

analysis into explicitly methodological discussions helped to redress the imbalance caused by undue focus on the “unique individual” in the neo-Kantian position. It was not that *practicing* historians and social scientists in Germany had ignored the issue of causation in treating historical events; but the theoretical elaboration of their work had made it seem as though it was no part of the scientist’s task to explain the occurrence of change, or the reason why a given individuality took the form it did, other than to point to the “irrationality” of reality and human freedom.<sup>86</sup> Weber argued that causal explanation was in fact a central part of any attempt to interpret such individualities.

Throughout the nineteenth century, members of the “Historical School” had in effect equated the causal analysis of events with an attempt to show that the world was deterministic and that there was no room for free will or action.<sup>87</sup> Weber took a middle course between the two supposed alternatives of determinism and freedom by pointing to the possibility of studying and describing causal connections in unique and contingent events. In order to do this, he made use of what he called “one-sided approaches” (“*einseitigen’ Gesichtspunkten*,” a phrase that we will see was used by Menger as well) and the technique of counterfactual reasoning. An excellent example of a one-sided approach was the economic interpretation of history. It was not that Weber thought that seeking out historical actors’ motives for economic gain or preservation of class interests could provide an *adequate* explanation of an event in most cases, but he would employ it “to the extent that it is successful in producing insights into interconnections which have been shown to be valuable for the causal explanation of concrete historical events.”<sup>88</sup> One-

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<sup>86</sup> Ibid., 2.

<sup>87</sup> Ibid., 25-26.

<sup>88</sup> Max Weber, “‘Objectivity’ in Social Science and Social Policy,” in *MSS*, 71 [170]. References in this section are to the standard English translation and, in the case of direct quotations, in square brackets to *Gesammelte Aufsätze zur Wissenschaftslehre*, 3d ed., ed. Johannes Winckelmann (Tübingen: J.C.B. Mohr, 1968). Where I thought it necessary to clarify the sense of a phrase, the German terms have been inserted into the text of the English translation, particularly as the quality of the Shils/Finch translation is often questioned.

sided approaches could create generalizations or rules that could be applied to historical or social reality to determine where the actual course of events diverged from the ideal predicted course.<sup>89</sup>

The precise causes of the actual events would then be more readily apparent, and one could reason counterfactually to determine which among the possible causes were necessary or sufficient.<sup>90</sup>

The same approach could be used in understanding past thought processes as well as explaining actions. Weber gives the example of two rival military commanders fighting a campaign. In order to comprehend their decisions, he suggests attributing to each an ideal rationality and a perfect knowledge of all factors relevant to the military situation, and observing their actual decisions in contrast to this hypothetical situation. “For only then can the consequences of the fact that the real commanders neither had the knowledge nor were they free from error, and that they were not purely rational thinking machines, be unambiguously established.”<sup>91</sup>

This strategy is the basis of what is perhaps Weber’s most famous contribution to social scientific method, the “ideal type.” Ideal types were neither hypotheses nor descriptions of reality, but guides to the creation of both, formed through the “one-sided *accentuation*” of selected aspects of reality into an analytical mental construct (*Gedankenbild*) which, in its pure form, could be found nowhere in actual human experience.<sup>92</sup> The function of the ideal type is “the comparison with empirical reality in order to establish its divergences or similarities, to describe them with the *most unambiguously intelligible concepts*, and to understand and explain

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<sup>89</sup> Weber, “Objectivity,” 72. “Ideal” not in a normative sense, but simply in formal agreement with the model.

<sup>90</sup> Eliaeson, *Max Weber’s Methodologies*, 49-53; Ringer, *Max Weber’s Methodology*, 69-71.

<sup>91</sup> Max Weber, “The Meaning of ‘Ethical Neutrality’ in Sociology and Economics,” in Shils and Finch, 42 [534].

<sup>92</sup> Weber, “Objectivity,” 90.

them causally.”<sup>93</sup> These “one-sided” heuristic devices all relied on the ability to generalize from particulars, to point to elements that “historical individuals” had in common, or to model behaviors that were reasonably common and predictable. Such regularities were an essential aspect of causal explanation—even explanation of the most unique and fortuitous of circumstances—if only because they set the pattern against which divergences could be identified. “Whether a single individual component of a relationship is, in a concrete case, to be assigned causal responsibility for an effect, the causal explanation of which is at issue, can in doubtful cases be determined only by estimating the effects which we *generally* expect from it and from the other components of the same complex which are relevant to the explanation.”<sup>94</sup>

From this account of selected aspects of Weber’s method, it is clear that he regarded the object of social science as a causal explanation of individual events or processes, not as a simple *description* of them in their full “uniqueness.” The detection of regularities in history, furthermore, helped the social scientist to construct a causal explanation, even if there was no strict determinism implied by this position. Here Weber was indeed at odds with his predecessors in the historical tradition and the Baden neo-Kantians. But when we ask what role values played, for Weber, in scientific method, his debt to Rickert is obvious. He acknowledged as much himself.<sup>95</sup>

The sciences, to begin with, are in Weber’s view divided not by subject matter, but by differences in method and conceptual tools, much as the neo-Kantians had argued.<sup>96</sup> The natural sciences seek to establish the laws that govern the universe, and the cultural or social sciences

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<sup>93</sup> Weber, “Ethical Neutrality,” 43 [535-36].

<sup>94</sup> Weber, “Objectivity,” 79 [179].

<sup>95</sup> See his repeated recommendations to readers that they consult the work of the neo-Kantians, “particularly Heinrich Rickert”: “Objectivity,” 50; “Ethical Neutrality,” 21; “Critical Studies in the Logic of the Cultural Sciences,” in *MSS*, 149-50; and also the well-known reference to reading and approving of Rickert’s work reported in Marianne Weber, *Max Weber*, 260.

<sup>96</sup> Weber, “Objectivity,” 68.



seek to render an “understanding of the characteristic uniqueness of the reality [*umgebende Wirklichkeit des Lebens*] in which we move.”<sup>97</sup> But reality for Weber, as for Rickert, is infinite and “irrational” in itself, and any attempt to describe cultural individualities must operate by some principle of selection.<sup>98</sup> He states the problem comprehensively in his essay on “Objectivity” in a passage worth quoting at length to show its affinity with Rickert:

[Life presents us with] an infinite multiplicity of successively and coexistently emerging and disappearing events, both “within” and “outside” ourselves. The absolute infinitude of this multiplicity is seen to remain undiminished even when our attention is focused on a single “object,” for instance, a concrete act of exchange, as soon as we seriously attempt an exhaustive description of *all* the individual components of this “individual phenomenon,” [*dies Einzelne*] to say nothing of explaining it causally. All the analysis of infinite reality which the finite human mind can conduct rests on the tacit assumption that only a finite portion of this reality constitutes the object of scientific investigation, and that only it is “important” in the sense of being “worthy of being known.”<sup>99</sup>

The human sciences therefore focus on the *culturally significant* aspects of history and society.<sup>100</sup> But these aspects cannot be determined by the use of natural scientific concepts (*Gesetzesbegriffen*, those aiming at strict laws), even though, as we saw above in considering causation, information from the rule-generating sciences may be useful as a *preliminary* step toward understanding individualities.<sup>101</sup>

Instead, the principle by which significance is determined is value-relevance (*Wertbeziehung*).<sup>102</sup> For instance, concrete technical developments like the harmonic fifth in Western music, or the development of the cross-arched vault in Gothic architecture, to use two of

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<sup>97</sup> Ibid., 72 [170].

<sup>98</sup> Ibid., 81. See also Oakes, *Weber and Rickert*, 19ff. and Ch.1 generally for a thorough critical account.

<sup>99</sup> Ibid., 72 [171].

<sup>100</sup> Ibid., 75.

<sup>101</sup> Ibid.

<sup>102</sup> Weber, “Ethical Neutrality,” 21 [511].

Weber's examples, have interest for us owing to "the aesthetic value of the work of art, which cannot be established by the empirical disciplines...."<sup>103</sup> As in Rickert's formulation, the investigator selects elements from the infinite manifold of the past that are "either directly value-relevant or are causally connected with other value-relevant phenomena."<sup>104</sup> This process is not the same as value *judgment*; no attempt is made to establish a moral or aesthetic or other axiological claim, and indeed where such claims are made, the scientific merit of the work suffers as a result.<sup>105</sup> Values are not *evaluated* by science; they merely—but importantly—"give purely empirical scientific work its direction."<sup>106</sup>

Weber's most striking departure from Rickert is his refusal to admit that there is any "common core" of values that will or ought to direct *all* scientists' efforts; his rejection of Rickert's transcendental approach is a function of his value subjectivism, a view he shared with the rest of the figures in this dissertation. Weber observes that there is emphatically a "personal" element in choosing the "direction" of any scientific project, and consequently, "all knowledge of cultural reality...is always knowledge from *particular points of view*."<sup>107</sup> This admission immediately raises the specter of subjectivity, not only of values, but pertaining to the validity of scholarly work as well. Here Weber faced the "objectivity" problem we discussed above. And in fact Weber readily admits a certain kind of subjectivity: "There is no absolutely 'objective' scientific analysis of culture...[or 'social phenomena'] independent of special and 'one-sided' viewpoints according to which—expressly or tacitly, consciously or unconsciously—they are selected, analyzed and organized for expository purposes."<sup>108</sup>

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<sup>103</sup> Ibid., 30 [521].

<sup>104</sup> Ibid., 42 [534].

<sup>105</sup> Ibid., 32-33.

<sup>106</sup> Ibid., 22 [512].

<sup>107</sup> Weber, "Objectivity," 82; 81 [181].

<sup>108</sup> Ibid., 72 [170].

But he insists that this subjectivity does not mean that the social sciences generate knowledge that is “valid” only for the investigator himself or herself. Only the degree of *interest* a given person will show for the results is affected by the central role of values, since the values in question may or may not attract that person.<sup>109</sup> “In the *method* of investigation, the guiding ‘point of view’ is of great importance for the *construction* of the conceptual scheme [*begrifflichen Hilfsmittel*] which will be used in the investigation,” writes Weber. “In the mode of their *use*, however, the investigator is obviously bound by the norms of our thought just as much here as elsewhere. For scientific truth is precisely what is *valid* for all who *seek* the truth.”<sup>110</sup> This claim is an important one, for it indicates the way in which Weber sought to salvage the objectivity and therefore the truth—and the usefulness—of social science even in the absence of Rickert’s transcendental argument for objective values. It did not matter, Weber thought, whether all possible investigators would agree on the “right” set of (universal) values to which cultural phenomena would be referred. He dismissed without further comment the idea that the act of selecting a particular value *reference* to direct scientific enquiry was itself a value *judgment*.<sup>111</sup> Any scholar should be able to verify the scientific rigor of a colleague’s argument—even if that colleague hailed from a vastly different culture—so long as both followed “the norms of our thought”: *die Normen unseres Denkens*. “It has been and remains true that a systematically correct scientific proof in the social sciences, if it is to achieve its purpose, must be acknowledged as correct even by a Chinese—or—more precisely stated—it must constantly *strive* to attain this goal...” whether or not the Chinese scholar has any *normative* use whatsoever for the values involved.<sup>112</sup> Weber, in short, appealed to reason and the uniformity of

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<sup>109</sup> Ibid., 84.

<sup>110</sup> Ibid. 84 [184].

<sup>111</sup> Weber, “Ethical Neutrality,” 11.

<sup>112</sup> Weber, “Objectivity,” 58-59 [156].

the scientific intellect to guarantee the results of investigations so closely connected with ungroundable values.

His belief in the possibility of verifying *certain* social scientific conclusions, regardless of the values that motivated their undertaking, led Weber to a limited yet highly positive view of the contribution sociology and economics could make to social *policy*. This question of the connection between *Sozialwissenschaft* and *Sozialpolitik* provides the best window onto Weber's views of value-freedom. His position was simple: scientific endeavor could never, under any circumstances, generate or validate particular values. Although most social scientific disciplines had had their origins in an attempt to discover the norms of economic or social life, Weber wrote, "it can never be the task of an empirical science [*Erfahrungswissenschaft*] to provide binding norms and ideals from which directives for immediate practical activity can be derived."<sup>113</sup> For, adopting the Is/Ought distinction, from a purely logical point of view, "the validity of a practical imperative *as a norm* and the truth-value of an empirical proposition are absolutely heterogeneous in character."<sup>114</sup> Facts and values were distinct and not to be mixed.<sup>115</sup> In this disillusioned epoch, after the turn of the twentieth century, human beings have learned that values and ideals cannot be anchored by the growth of knowledge; rather, people adopt them on "faith" in the midst of "the struggle with other ideals which are just as sacred to others as ours are to us."<sup>116</sup>

But if science cannot produce values, it can serve as a tool to *further* values or ends set exogenously, whether by an individual will or an election or any other decision mechanism. Because of its ability to produce objective knowledge through the acceptable norms of scientific

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<sup>113</sup> Ibid., 51-52 [149].

<sup>114</sup> Weber, "Ethical Neutrality," 12.

<sup>115</sup> Weber to Robert Michels, 16 August, 1908, in MWG II/5, *Briefe 1906-1908*, 637.

<sup>116</sup> Weber, "Objectivity," 55; 57 [154].

thinking, it can provide, say, a political figure with all the information he needs to decide on a means to reach a predetermined goal: which means are available, what their respective consequences would be, and even what the logical consequences of his own value commitments might be, so as to proof their internal consistency.<sup>117</sup> It cannot, however, tell him which *end* to select. “An empirical science cannot tell anyone what he *should* do—but rather what he *can* do—and under certain circumstances—what he wishes to do.”<sup>118</sup> Weber makes clear that this strict separation of social scientific inquiry and the determination of political ends does *not* entail neutrality or “moral indifference” on the part of the social scientist. A particular political or social stance may quicken one’s interest in undertaking research on a scientific problem in the first place, and there is no reason that social scientists should withhold their own value judgments provided that they keep these rigidly separate from their specifically scientific pronouncements.<sup>119</sup>

Weber’s views on the role of values in university education were analogous. As we have seen, science in his view could not generate values; unlike many of his contemporaries, he had no confidence that scholarship would advance the sorts of values advocated in the traditional conception of *Bildung*. He famously argued in the 1918 lecture “*Wissenschaft als Beruf*” that “the world is disenchanted” as a result of the continual advance of learning, and that science cannot help answer the question, “What shall we do and how shall we live?”<sup>120</sup> Professors in their teaching could well advocate particular values, provided that they strictly separated their value judgments from their scientific claims and made certain that their students were not left in

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<sup>117</sup> Ibid., 53-54.

<sup>118</sup> Ibid. 54 [151].

<sup>119</sup> Ibid., 60-61.

<sup>120</sup> Max Weber, “Politics as a Vocation,” in *From Max Weber: Essays in Sociology*, ed. Hans Gerth and C. Wright Mills (New York: Oxford University Press, 1946), 139, 143.

any uncertainty on the matter of which was which.<sup>121</sup> But the idea that these values could in any sense be gleaned from and established securely by study and the “re-experiencing” of great texts was not a live one for Weber. Universities, he wrote in 1909, “are not institutions for the inculcation of absolute or ultimate moral values. They analyze facts, their conditions, laws, and interrelations.... They do not and they cannot teach what should happen....”<sup>122</sup> Though the universities can offer students an acquaintance with the major *Weltanschauungen*, “they would be going beyond the boundaries of science and scholarship if they were to provide not only knowledge and understanding but also beliefs and ‘ideals.’”<sup>123</sup>

This concludes our brief survey of Weber’s views on the subject of values and value-freedom in the social sciences oriented toward explaining meaningful human action. Weber’s originality as a thinker is beyond question, and yet in what follows we will encounter many of the ideas examined here in earlier or independent formulations, a fact that would not have dismayed Weber in the least. He, too, gave indications of interest in value-freedom in an earlier period—his 1895 inaugural lecture at Freiburg contains skeptical remarks on the possibility of a normative science—although these were not developed.<sup>124</sup> But interest in value-freedom in German-language social science had arisen even before that time, when Weber was a student in the 1880s. It was then that an Austrian economist, Carl Menger, made the issue a central part of

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<sup>121</sup> “Ethical Neutrality,” 10; 20.

<sup>122</sup> Max Weber, “The Academic Freedom of the Universities,” in *On Universities: The Power of the State and the Dignity of the Academic Calling in Imperial Germany*, ed. and trans. Edward Shils (Chicago: University of Chicago Press, 1973), 21.

<sup>123</sup> *Ibid.*

<sup>124</sup> Weber, “Der Nationalstaat und die Volkswirtschaftspolitik,” in MWG I/4, *Landarbeiterfrage, Nationalstaat und Volkswirtschaftspolitik* (Tübingen: Mohr Siebeck, 1993), 563; “The Nation State and Economic Policy,” in Peter Lassman and Ronald Speirs, eds., *Political Writings* (Cambridge: Cambridge University Press, 1994), 1-28, here 18; on Weber’s views in 1895 and Werner Sombart’s 1897 essay expressing more developed tendencies toward value-freedom, see Rita Aldenhoff, “Nationalökonomie und Kulturwerte um 1900,” in Rüdiger vom Bruch, et al., eds., *Kultur und Kulturwissenschaften um 1900* (Stuttgart: Steiner, 1989).

his open quarrel with German historical economics and its leader, Gustav Schmoller. We turn next to the ideas of these two antagonists.

## **Part I: Economics and Sociology**

### **Chapter 2.**

#### **“Ethical” Political Economy and “Value-Free” Economics in the Era of the *Methodenstreit*:**

##### **The German Historical School and Carl Menger**

Political economy was the very first social scientific discipline to open the door to value-freedom, and has ever after been its most regular and solicitous host. Long before the German disputes of the early twentieth century gave the value-freedom complex its first careful formulations—and its cumbrous and inaccurate name—English and Irish political economists had entered many of its elements into their guestbooks and made them fit for polite company. Let us, then, briefly look through the windows of these Victorian drawing-rooms before crossing the North Sea to Germany and Austria, where the evening’s conversation will become more heated.

In the form of a distinction between the “science” and “art” of political economy, such major classical writers on economic methodology as Nassau William Senior (1790-1864), John Stuart Mill (1806-1873) and John Elliott Cairnes (1823-1875) called variously for the separation of theory and practice, of ends and means, and for acknowledgement of the inability of science to pronounce on the rightness or wrongness of political decisions.<sup>1</sup> There was no attempt to marginalize normative questions as unimportant or out-of-bounds for the political economist as a participant in policymaking, but only a reminder that such activities were practical ones

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<sup>1</sup> On the versions of the distinction in British economics, with some remarks on Pareto and Weber, T.W. Hutchison, *‘Positive’ Economics and Policy Objectives* (Cambridge: Harvard University Press, 1964), 23-43, remains the best historical survey. More recent work addressing “value-free” economics emphasizes the contributions of philosophers and major twentieth-century economists, generally focusing on criticisms of value-freedom rather than on its origins: Mark Blaug, *The Methodology of Economics*, 2d ed. (Cambridge: Cambridge University Press, 1992), Ch.5; Hilary Putnam and Vivian Walsh, eds., *The End of Value-Free Economics* (London: Routledge, 2012).



inherently dissimilar to that of discovering how the economy functioned. In an era of intensive debates about politics and policy ranging from the extent of parliamentary suffrage to grain tariffs during the 1830s and 1840s (which had some parallels to the economic issues and class tensions of the German *Kaiserreich*), normative questions and policymaking were indeed “of great interest and difficulty,” as Senior wrote, “but [they] no more form part of the Science of Political Economy, in the sense in which we use that term, than Navigation forms part of the Science of Astronomy.”<sup>2</sup> The scholar might be directly involved in advocacy as a citizen—and the classical economists most certainly were—but not *as* a scholar. “The business of a Political Economist,” Senior continued, “is neither to recommend nor to dissuade, but to state general principles, which it is fatal to neglect, but neither advisable, nor perhaps practicable, to use as the sole, or even the principal, guides in the actual conduct of affairs....”<sup>3</sup>

This limitation of the scholar’s role dovetailed with a conception of political economy as the study of “means” which could have nothing to say about the ends to which they were directed. Senior’s mentor, Archbishop Richard Whately (1787-1863), may well have been the first practicing “social scientist” to effect this separate consideration of ends and means; perhaps as a defense of the legitimacy of the Anglican tradition of political economy to which he and T.R. Malthus belonged from attack by the utilitarian Radicals on the left and various Romantic critics mostly on the right, Whately argued that the political economist was to determine “the means by which wealth may be preserved or increased. To inquire how far wealth is *desirable*, is to go out of his proper province.”<sup>4</sup> Cairnes, in his influential restatement of the methods of

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<sup>2</sup> Nassau William Senior, *An Outline of the Science of Political Economy* (London: Clowes, 1836), 129.

<sup>3</sup> *Ibid.*, 129-30. Senior also elaborated on the need to divide descriptive and normative functions, science and art, in a later set of lectures published as *Four Introductory Lectures on Political Economy* (London: Longman, Brown, Green, and Longmans, 1852); see esp. Lecture III.

<sup>4</sup> Whately quoted in A.M.C. Waterman, *Political Economy and Christian Theology Since the Enlightenment* (New York: Palgrave Macmillan, 2004), 137. Waterman argues that Whately provided the first real elaboration of the idea of “value-free” or positive political economy: 141.

classical political economy in 1857, concurred that the discipline “stands apart from all particular [socioeconomic] systems, and is, moreover, absolutely neutral as between all.” That is, he said, it was neutral in “pronounc[ing] no judgment on the worthiness or desirableness of the ends aimed at in such systems,” as opposed to the factual question of the most effective means to those ends.<sup>5</sup> One need have no dubious recourse, then, to claims of influence for Comtean positivism (via J.S. Mill) to explain classical political economy’s receptivity toward a variant of value-freedom; the tradition’s own thinkers evolved a version of positive methodology.

Perhaps unsurprisingly in light of the common association between value-freedom and professionalization, its nineteenth-century English advocates tended to occupy university chairs and professional organizations, even though so much of Victorian intellectual life took place outside of formal academic settings. Whately, Senior, and Cairnes all occupied chairs in political economy at Oxford or Trinity College, Dublin at one point or another in their careers. Certainly those who brought about the gradual replacement of classical political economy with early neoclassical or marginalist economics in England from the 1870s until the 1890s were chaired university economists with an interest in making the discipline more rigorous through the use of professional standards and mathematical methods.<sup>6</sup> Both William Stanley Jevons (1835-1882), at Owens College in Manchester and then University College, London, and Alfred Marshall (1842-1924), who decisively shaped the influential Cambridge economics program,

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<sup>5</sup> John Elliott Cairnes, *The Character and Logical Method of Political Economy*, 2d ed. (London: Macmillan, 1875 [1857]), 20. For John Stuart Mill, in his important early essay on the methods of political economy, the discipline ought to produce results that could be trusted and employed by those of any partisan position: Mill, “On the Definition of Political Economy” (1836/1844), in *Collected Works*, ed. J.M. Robson (Toronto: University of Toronto Press, 1963-91), IV, 312.

<sup>6</sup> John Maloney, *Marshall, Orthodoxy and the Professionalisation of Economics* (Cambridge: Cambridge University Press, 1985); Alon Kadish and Keith Tribe, eds., *The Market for Political Economy: The Advent of Economics in British University Culture, 1850-1905* (London: Routledge, 1993).

voiced their support for the conception of value-freedom found in the “art/science” distinction in the course of promoting the professionalization of economics.<sup>7</sup>

Jevons warned against “the misinterpretation by the public of the relation between science and practice” and made the customary reference to the difference between practical crafts and scientific theories—the latter might be used to improve the former, but only through the deployment of general principles to specific ends.<sup>8</sup> Marshall agreed, writing in 1879 along with his wife Mary Paley Marshall that “gradually science becomes able to predict future events with increasing confidence and accuracy. But this is all that a science can do; it cannot claim to be a guide in life, or to lay down rules for the practical conduct of affairs. That is the task of what in old times used to be called an Art.”<sup>9</sup> A few years later in his inaugural lecture at Cambridge he elaborated, “Having done its work [economics] retires and leaves to common sense the responsibility of the ultimate decision [in policy questions]; not standing in the way of, or pushing out any other kind of knowledge, not hampering common sense in the use to which it is able to put any other available knowledge, nor in any way hindering; helping where it could help, and for the rest keeping silence.... [A]n economist as such cannot say which is the best course to pursue, any more than an engineer as such can decide which is the best route for the Panama canal. It is true that an economist, like any other citizen, may give his own judgment as to the best solution of various practical problems.... But in such cases the counsel bears only the authority of the individual who gives it: he does not speak with the voice of his science. And the economist has to be specially careful to make this clear; because there is much misunderstanding as to the scope of his science, and undue claims to authority on practical matters have often been

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<sup>7</sup> One could easily add the influential, if transitional, Cambridge professor Henry Sidgwick to Jevons and Marshall on this matter. See especially Sidgwick, *The Principles of Political Economy* (London: Macmillan, 1883), 12-29.

<sup>8</sup> Jevons, *The State in Relation to Labour* (London: Macmillan, 1882), 9-10.

<sup>9</sup> Alfred and Mary Paley Marshall, *The Economics of Industry*, 2d ed. (London: Macmillan, 1881 [1879]), 3.

put forward on its behalf.”<sup>10</sup> Owing to this susceptibility, economists and their readers must always be reminded that “the Laws of Economics are statements of tendencies in the indicative mood, and not ethical precepts in the imperative,” as Marshall put it in the preface to his major work of 1890.<sup>11</sup>

Much like J.S. Mill—and, indeed, like many proponents of value-freedom—Jevons and Marshall were not entirely consistent even at the level of theory, let alone in their practice. Jevons’ writings on economic theory themselves, to say nothing of his essays on economic and social policy, are scattered with value judgments. Marshall was as conflicted here as he was elsewhere, trying to balance the construction of rigorous economic theory with the innate ‘do-goodery’ that John Maynard Keynes would later disparage as owing to the former’s Victorian earnestness.<sup>12</sup> But a commitment to value-freedom in economics had been presented, and was indeed enshrined in the principal English treatise on economic methodology between Cairnes and Lionel Robbins—John Neville Keynes’ *Scope and Method of Political Economy* (1891), which demarcated a sphere of the “positive science of political economy” with explicit reference to the categorical philosophical distinction between Is and Ought as well as that between science and art.<sup>13</sup>

This background in British economics is worth keeping in mind for this and the following chapters, on several grounds. First, it is a reminder that value-freedom was not entirely new as a

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<sup>10</sup> Alfred Marshall, “The Present Position of Economics,” (1885), in Arthur C. Pigou, ed., *Memorials of Alfred Marshall* (London: Macmillan, 1925), 164-65. Marshall made much the same argument in the third edition of his famous textbook: Alfred Marshall, *Principles of Economics*, 9<sup>th</sup> (Variorum) ed., 2 Vols. (London: Macmillan, 1961 [1890]), vol. II: 154.

<sup>11</sup> Marshall, *Principles*, vol. I: v-vi.

<sup>12</sup> See J.M. Keynes, “In Memoriam: Alfred Marshall, 1842-1924,” in Pigou, ed., *Memorials*, 1-65; also reprinted in J.M. Keynes, *Essays in Biography* (London: Macmillan, 1972 [1933]), in *Collected Writings*, vol. X; see Marshall, “Social Possibilities of Economic Chivalry,” in Pigou, *Memorials*, 323-352, for an example.

<sup>13</sup> J.N. Keynes, *The Scope and Method of Political Economy*, 4<sup>th</sup> ed. (London: Macmillan, 1917 [1891]), Ch.2, esp. 46-60. It is worth observing that J.N. Keynes, like his colleague and sometime friend Marshall, was well-read in the works of the German historical and “ethical” economists, and was thoroughly fair to them; he cited, for instance, Adolph Wagner’s claims about the inseparability of positive and normative judgments in the course of his discussion in this chapter.

*social scientific* doctrine,<sup>14</sup> even if the debate about it reached a qualitatively different level of intensity, and in some cases sophistication, in the German context. Second, as sources of insight, the classical economists and sometimes Marshall and J.N. Keynes too were available to the German participants, although of course some of the most widely read classical economists from Adam Smith to Malthus to J.R. McCulloch were anything but proponents of “positive” economics kept free of policy judgments.<sup>15</sup> Third, the fact that it was theoretical economists who were the most visible and persistent advocates of value-freedom among social scientists in quite different countries—including but not limited to Britain, Austria-Hungary, and Germany—raises the possibility that there is a particularly strong connection between value-freedom and the method, subject matter, or manner of reasoning characteristic of economics. This suspicion is accentuated by the fact that economics both evinced the earliest commitment to value-freedom, and probably remains the only social science in which a sizable number of contemporary practitioners of different persuasions and specialties still adhere to some version of the doctrine, in an era in which it has become unfashionable. Finally, however, even this brief juxtaposition reveals not only continuities and shared assumptions but also differences of emphasis, understanding, terminology, and intellectual tradition. The German-language discussion of values and value-freedom we will encounter here and in the following chapters was shaped by a heterogeneous set of traditions, including above all historicism and neo-Kantianism, both of which were essentially absent from the British economists’ horizon, while in economics

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<sup>14</sup> Quite aside from the tendency among philosophers to trace it back to David Hume in the form of the Is/Ought distinction.

<sup>15</sup> We shall see below, for instance, that Cairnes was an important source for Menger.

specifically the notion of a subjective source of value in individuals' perceptions of their wants was characteristically German.<sup>16</sup>

The previous chapter outlined the position on value-freedom and objectivity that Max Weber took in the first decade of the twentieth century, and we had occasion to remark that some of the concerns he raised dated back not only to his inaugural lecture of 1895 but to the ongoing methodological discussion opened by Carl Menger (1840-1921) in the 1880s. This chapter will document the positions taken by Menger and the chief names among the historical economists whose views he opposed. The sharply-worded 1883-1884 controversy between Menger and Gustav Schmoller (1838-1917), the powerful Berlin representative of the historical approach, concerned not only the relative adequacy of historical and “abstract” methods, but also the appropriateness of a normative or “ethical” social science.

Menger emerged in this dispute as the first major German-language economist to embrace the “value-free” science ideal in a form recognizably similar to that later taken by Weber. Despite his very different philosophical pedigree, Menger combined the same basic set of commitments that led the other figures in this dissertation to adopt the value-freedom ideal. First, he accepted and promoted a version of social science—in his case, economics—which insisted on the need to take seriously the subjectively experienced intentions, meanings, and other mental states of human beings conceived as agents pursuing ends. This commitment differentiated him from nineteenth-century positivist currents which also sought objective knowledge of the human world, but at the cost of excluding consideration of subjective aims and values by making human conduct automatic or determined, causally or statistically.

Simultaneously, he tried to ensure that his social science could offer theoretical explanations of

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<sup>16</sup> This statement must be qualified in the case of historicism with regard to Marshall and J.N. Keynes, though they were responding at least as much to the German historical economists themselves as to English and Irish figures like T.E. Cliffe Leslie, William Cunningham, and W.J. Ashley (or to the earlier Richard Jones).

such subjectively-determined actions without itself falling victim to subjectivity, and did so by employing theoretical “selection criteria” in the form of “types.” At the risk of some confusion we will designate this two-part commitment as “interpretive social science,” meaning thereby not a purely hermeneutic endeavor but a theoretical science aiming at explanation of human actions, which nonetheless refuses to exclude consideration of subjective mental states and values. Second, Menger took the values and goals of human agents to be subjective in the additional sense of non-rational or “arbitrary,” a matter of personal preference or will. Third, he accepted the set of distinctions which made up the value-freedom complex itself, including especially those between theory and practice, and Is and Ought. Coupled with the doctrine of value subjectivism, this led Menger to face the problem of securing his social science itself from the threat of arbitrariness or bias. This “objectivity problem,” which he implicitly attempted to push back with the tools of a “realist” or essentialist philosophical doctrine, ultimately limited the viability of his entire approach just as it threatened those of the other figures who attempted to adopt this complex of ideas in one form or another.

Although our principal focus is naturally on Menger’s work, it is necessary to begin with the “historical school” in German economics. For it is not quite true that this heterogeneous collection of scholars served purely as a model of what to avoid in order to pursue “value-free” science. Just as the value-freedom advocates came to their doctrine from a variety of intellectual backgrounds, and emphasized different features of it in their methodological writings, so too the historical economists we consider next came to their conviction of an “ethical” political economy from different directions, and they sometimes shared more in common with their opponents than expected.

## I. The German Historical School and “Ethical” Political Economy

As the common antagonist of Carl Menger in the *Methodenstreit* of the 1880s and of Max Weber in the *Werturteilsstreit* of the years before World War I, Gustav Schmoller may seem a likely foil for the advocates of value-freedom, a scholar whose views run exactly counter to the idea of a “value-free” social science. And so he was in one regard, for it is clear that it was to a large degree Schmoller’s ideal of a politically active social science, the results of which would somehow both remain objective and feed directly and normatively into particular social policies of the German state, which made value-freedom into a rallying cry for his opponents, from Max Weber and Werner Sombart to now obscure economists such as Julius Wolf and Ludwig Pohle.<sup>17</sup> Schmoller was, perhaps alongside Adolf Wagner, the most visible and influential of the scholars who promoted the notion that political economists should assess the socioeconomic developments they studied against the “ideals” of their times, and promote policies to achieve more “ethical” outcomes in the economic field as a core part of their *scientific* work.<sup>18</sup>

Despite this pivotal area of disagreement, however, we must observe that Schmoller’s views on the task of economics were not in any simple sense directly antithetical to those of the value-freedom advocates, for there were in fact several areas of continuity between Schmoller

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<sup>17</sup> The same was true of Menger in the earlier dispute, *mutatis mutandis*: although Menger did not use the terminology of value-freedom in the *Methodenstreit*, nor did he initially see Schmoller as his principal opponent in 1883, he did take Schmoller to task for confusing theory and practice, as we shall see in the following section. On Wolf and Pohle, see Heino Heinrich Nau, “Zwei Ökonomien: Die Vorgeschichte des Werturteilsstreits in der deutschsprachigen Ökonomik,” in Nau, ed., *Der Werturteilsstreit* (Marburg: Metropolis, 1996); Rüdiger vom Bruch, *Wissenschaft, Politik und öffentlichen Meinung* (Husum: Matthiesen, 1980), 300-318.

<sup>18</sup> On Schmoller’s place in German social science, his enormous influence on academic appointments and his key role in the Verein für Sozialpolitik, see Helge Peukert, “The Schmoller Renaissance,” *History of Political Economy* 33:1 (2001), 71-116; Erik Grimmer-Solem, *The Rise of Historical Economics and Social Reform in Germany, 1864-1894* (Oxford: Clarendon, 2003); Birger Priddat, *Die andere Ökonomie : eine neue Einschätzung von Gustav Schmollers Versuch einer “ethisch-historischen” Nationalökonomie im 19. Jahrhundert* (Marburg: Metropolis, 1995); Nicholas Balabkins, *Not By Theory Alone: The Economics of Gustav von Schmoller and Its Legacy to America* (Berlin: Duncker & Humblot, 1988), esp. 48-49; Sven Thomas, *Gustav Schmoller und die deutsche Sozialpolitik* (Düsseldorf: Hans-Böckler-Stiftung, 1995). For his position on “ethical” political economy, see below.



and his critics as well. Schmoller even evinced (highly limited) support for key components of value-freedom in some of his moods, and more importantly he helped to place real, historically conditioned economic agents on the horizon for political economy as a theoretical discipline. Certainly Weber, too, drank from the powerful current of historicism in nineteenth-century Germany which in the realm of economic history found its high-water mark during the imperial period in Schmoller's work, and this chapter will argue that the historicist focus on interpretive understanding of individual and cultural meanings was essential to the growth of a non-positivist "value-free" social science even in Menger.

Of course, we cannot simply equate Schmoller's perspective with that of the "German Historical School" of political economy on the one hand, or with that of the *Kathedersozialisten* on the other; some examination of the nineteenth-century roots of German economics is required for understanding either Schmoller or his opponents. Thus, this section aims to set the stage for the later rise of "value-free" economics in the years of the *Methodenstreit* by outlining the views of Schmoller's predecessors in historical economics—as well as his own—on economic method, "ethical" political economy, and objectivity, concluding with the seemingly opposing position on objectivity held by his fellow *Kathedersozialist* and Verein member, Lujo Brentano.<sup>19</sup> Schmoller's own program was of course indebted to prior economic ideas as well as to his convictions about contemporary social problems, and consequently we begin with some background in earlier nineteenth-century German political economy. The principal reason to take note here of such earlier "historical" economists as Wilhelm Roscher (1817-1894), Bruno

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<sup>19</sup> This section is not intended as a portrayal of the overall work of the older historical economists, Schmoller, or Brentano, but only of specific ideas relevant to the notion of a historically nuanced science of economics and to value-freedom and objectivity.

Hildebrand (1812-1886), and Karl Knies (1821-98) is not that they formed a cohesive “school”<sup>20</sup> of which Schmoller was simply a younger member, but that they rhetorically initiated the program of combatting classical political economy’s “abstract theory” by means of historical economic studies to which Schmoller and his students would later give more actual substance. The notion of a German historical school of economics, which is a commonplace in textbooks on the history of the discipline, has been subjected to criticism by a number of scholars, who argue that the economists usually grouped under this heading shared very little. They formed a coherent group neither in nationality (historical economics was often practiced beyond the boundaries of Germany), nor in a common historical method (in the sense of taking their data primarily from the past or in the sense of an idiographic approach which abjured generalization), nor even in their direct personal connections or a common set of convictions on such matters as economic policy and the role of the state.<sup>21</sup> This argument has been carried too far,<sup>22</sup> ignoring some genuine commonalities, but its de-homogenization of the historical economists is a valuable service. Instead, therefore, of presenting the work of Roscher, Hildebrand, and Knies as a unified body of doctrine, we will simply identify certain features of the thought of these quite

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<sup>20</sup> David Lindenfeld, “The Myth of the Older Historical School of Economics,” *Central European History* 26:4 (1993), 405-416, effectively demolishes the notion that Roscher, Hildebrand and Knies shared a method or agreed on the details of their common program of introducing historical considerations into the domain of political economy. This argument had been advanced sketchily before, e.g. by Harald Winkel, *Die deutsche Nationalökonomie im 19. Jahrhundert* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1977), 99.

<sup>21</sup> Heath Pearson, “Was There Really a German Historical School of Economics,” *History of Political Economy* 31:3 (1999), 547-62; Grimmer-Solem, *Rise of Historical Economics*, 19-34.

<sup>22</sup> Geoffrey Hodgson, *How Economics Forgot History* (London: Routledge, 2001), 56n.1, is probably correct that Pearson’s (and *a fortiori* Grimmer-Solem’s still more stringent) criteria for what constitutes a school are so strict that it would be difficult to distinguish any ‘schools’ in the history of economics according to them. This is itself a largely ‘scholastic’ question, however; no one denies that an unusually large and influential contingent of nineteenth-century German economists promoted (either rhetorically or in their actual practice) the replacement or extensive supplementation of “abstract theory” with historical data about the economic life of particular nations, institutions or groups, as a means of improving the scientific character and level of certainty of economic knowledge, or that that many of them self-identified as belonging to a “historical school.” This is true not just of the commonly mentioned Roscher, Hildebrand, Knies, and Schmoller, but also of now-forgotten economists of equal stature, such as Georg Hanssen in the earlier period, or the less commonly discussed Knapp, Bücher and Held in the later period. For a balanced assessment of the adequacy of the “historical school” concept, see Roman Köster, *Die Wissenschaft der Aussenseiter: die Krise der Nationalökonomie in der Weimarer Republik* (Göttingen: Vandenhoeck & Ruprecht, 2011), 34-35.

different men which are relevant to the later debates between Schmoller and his opponents. Such background is further necessary because it was the work of these older figures, and not that of Schmoller, which supplied the main object of Menger's critique in his principal contribution to the *Methodenstreit*, the *Untersuchungen (Investigations)* of 1883—even as they also simultaneously anticipated certain doctrines which would later be important to the advocates of value-freedom.

German political economy in the first half of the nineteenth century was a discipline in transition. In the era in which the older historical economists' views were formed, political economy remained an integral branch of the moral-political sciences known as the *Staatswissenschaften*, or sciences of state, which had grown up in the German universities of the eighteenth century as a body of knowledge useful for the moral and political training of state officials.<sup>23</sup> The particular sciences known as cameralism and *Polizeiwissenschaft* had traditionally addressed what modern systems of classification would consider economic questions, but with a particular perspective, viewing the economy as part of a well-ordered domain in which the princely government ensured that its various “populations” were managed in their activities according to the needs appropriate to their social estates (*Stände*) and in accordance with the requirements for state power and expansion.<sup>24</sup> The introduction of Adam

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<sup>23</sup> David Lindenfeld, *The Practical Imagination: The German Sciences of State in the Nineteenth Century* (Chicago: University of Chicago Press, 1997), is a fine history of these disciplines; on the relevant period see Chapters 3 and 4. As Lindenfeld argues, these future officials also received much of their practical training on-the-job, but part of the strategy for success and expansion among professors of *Staatswissenschaft* in the universities from the eighteenth century onward was to teach relevant forms of practical reasoning: these disciplines were in no sense intended to be purely “theoretical,” aiming simply for “truth” apart from practice. A voluminous older but still useful German work which addresses the academic and practical sides of *Staatswissenschaft* is Heinrich Heffter, *Die deutsche Selbstverwaltung im 19. Jahrhundert: Geschichte der Ideen und Institutionen* (Stuttgart: Koehler, 1950).

<sup>24</sup> Keith Tribe, *Governing Economy: The Reformation of German Economic Discourse, 1750-1840* (Cambridge: Cambridge University Press, 1988), 21-22, 29-32. As Tribe points out, German cameralism was not merely a form of mercantilism, as Adam Smith charged in 1776: though it shared elements of mercantilism in its focus on domestic production over foreign trade, and the maintenance of domestic stores of precious metals, it was also oriented much more to achieving measures for the prevention of disorder and the promotion of a particular conception of the *political* order of the country. Cameralism was not just a body of economic doctrine. *Ibid.*, 66, 74-75.

Smith's political economy in the 1790s was associated with (even if it did not by itself "cause") a change in perspective.<sup>25</sup> As the German academy became preoccupied with the rights-bearing, decision-making individual and with the sphere of "civil society" during the period of greatest excitement about the moral-political side of Kant's critical philosophy and the French Revolution, a new science of *Nationalökonomie* grew up alongside the older cameralism.<sup>26</sup> Addressing the economic actions of individuals operating separately from state control, professors of the new political economy agreed that their discipline "was concerned with the general principles of economic life which governed the manner in which needs arose, were satisfied, and in so doing contributed to the progress of popular wealth. *Nationalökonomie* was deliberately juxtaposed to *Staatswirtschaft*," or the state management of public properties.<sup>27</sup>

The new political economy did not simply replace the older cameralism, however. Through the 1820s, the two coexisted as new chairs of political economy were added without the removal of the cameralistic subjects from the curriculum.<sup>28</sup> And a sort of synthesis formed under the aegis of the Heidelberg scholar Karl Heinrich Rau, whose multivolume *Lehrbuch der politischen Ökonomie* was far and away the most influential German economics text of the middle third of the nineteenth century: first published in 1826, its ninth and posthumous edition appeared under the editorship of Adolf Wagner in 1876.<sup>29</sup> Rau was more of a *Nationalökonom*

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<sup>25</sup> Strictly speaking, Smith's *Wealth of Nations* (1776) had in fact been translated into German soon after its first publication, but did not make a mark on the German discussion until after the second (Garve) translation, in the 1790s: *ibid.*, 148, 150; Harald Winkel, "Adam Smith und die deutsche Nationalökonomie 1776–1820," in *Studien zur Entwicklung der ökonomischen Theorie*, Schriften des Vereins für Socialpolitik, Neue Folge 115:5, ed. Harald Scherf (Berlin: Duncker und Humblot, 1986), 81–109. On the reception of Smith in Germany, see also Ian Simpson Ross, *The Life of Adam Smith* (Oxford: Clarendon Press, 1995), 364–67.

<sup>26</sup> Lindenfeld, *Practical Imagination*, 55–67.

<sup>27</sup> Tribe, *Governing Economy*, 174. Despite its later connotations, the name *Nationalökonomie*, Tribe observes, was originally used by Kant-influenced theorists to refer to the study of *all* the resources of the nation in contradistinction to the subset which was administered publicly (*Staatswirtschaft*), and relied on the new and important public/private distinction. *Nationalökonomie* was thus associated at the outset with the *private* wealth-production of civil society, not the national state: 169–70.

<sup>28</sup> *Ibid.*, 182.

<sup>29</sup> *Ibid.*, 183; Lindenfeld, *Practical Imagination*, 119.

than a cameralist, but his work fit very well under the practical, moral-political umbrella of the *Staatswissenschaften*. He introduced few innovations himself, but his textbook institutionalized within a single work the division between the study of “private economy” and “public economy.”<sup>30</sup> The discussion of private economy in Rau’s first volume was primarily based on classical ideas from Smith to Say, dealing with the theory of value and price, and of capital and wages, and oriented toward the explanation of production, distribution and consumption along classical lines. Its view of the state both in volume 1 and in volume 2, which took up the traditional cameralist questions, was broadly in line with the economic liberalism of the classical tradition, regarding the task of the state not as providing the sole source of public order but as promoting private citizens’ preexisting initiative and enterprise through education and other public goods. (Rau was thus not at all averse to making normative recommendations in his capacity as a good *Staatswissenschaftler*, even if he followed a liberal rather than a traditional “etatist” path.) The compromise or synthesis element came largely through Rau’s greater orientation to *description* of existing economic structures within a German context, what Keith Tribe describes as a focus on “economic anthropology” or an account of the “practical workings of industry and trade,” which tended to supplant the *theoretical-analytical* drive of Smith and Ricardo, on whom Rau otherwise relied.<sup>31</sup> Rau thus provided a quintessential instance of the early nineteenth-century German tendency to couple pure theory with the discussion of particular

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<sup>30</sup> For the following on Rau, see Tribe, *Governing Economy*, 190-99; Lindenfeld, *Practical Imagination*, 120-121, 137; Erich Streissler, “Carl Menger, der deutsche Nationalökonom,” in Birger Priddat, ed., *Wert, Meinung, Bedeutung: Die Tradition der subjektiven Wertlehre in der deutschen Nationalökonomie vor Menger* (Marburg: Metropolis, 1997), 49-52.

<sup>31</sup> Tribe, *Governing Economy*, 192.

institutional and national particularities, and to rely on descriptive thoroughness rather than analytical precision.<sup>32</sup>

Two major scholars of the German political-economic sciences have seen the tendency, embodied in Rau, to separate the practical and particularistic cameralist tradition from economic theory in the *Nationalökonomie* tradition, with its source in Anglo-French political economy and its universalistic orientation, as the source of subsequent analytical divisions of economic method in Germany. Both Wilhelm Hennis and Keith Tribe have argued that the methodological division between pure and applied economics—theory and practical policy—originated, in the German case, out of this separation, and Tribe has further suggested that the separation is at the basis of the divergence of the “universalistic” or exact-theoretical method and the “historical” method in the 1840s.<sup>33</sup> We shall have more to say about the separation of theory and practice as an element of value-freedom in economics, and about “exact” and historical methods, later in this chapter, but for the moment one other unrelated legacy of the early nineteenth century deserves emphasis. We alluded above to the conception of political economy as a study of the way in which human needs or wants are satisfied, which was shared by Rau and other professors of *Nationalökonomie*.<sup>34</sup> This seemingly innocuous statement in fact represents a theoretical position from which early nineteenth-century German economists derived a theory of economic value oriented toward the perceptions of individual consumers. In contrast to the theory of value characteristic of English classical political economy, which focused on factor costs, especially

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<sup>32</sup> There are, obviously, exceptions: the first volume of Heinrich von Thünen’s *Der isolirte Staat* (1826), for instance, is a powerful instance of “pure theory” or economic analysis not reliant on empirical description. Then again, Thünen was not a university economist: see Lindenfeld, *Practical Imagination*, 135-137.

<sup>33</sup> Wilhelm Hennis, “A Science of Man: Max Weber and the Political Economy of the German Historical School,” in Wolfgang J. Mommsen and Jürgen Osterhammel, eds., *Max Weber and his Contemporaries* (London: Unwyn Hyman, 1987), 25-58, here pp. 34, 51-52; Tribe, *Governing Economy*, 205.

<sup>34</sup> The German word in question is “*Bedürfnisse*,” the exact meaning of which is ambiguous as it can signify both “needs” and “wants”—a characteristic worth noting in considering the question of the objectivity or subjectivity of value.

the cost of labor, in determining the value of goods over the long run, from the very early nineteenth century German economic thought possessed the makings of a *subjective* value theory in which the value of goods was in some degree conferred by the subjective perceptions of individual economic agents aiming to satisfy their needs or wants.<sup>35</sup> In 1807, for instance, the economist Gottlieb Hufeland (an expounder of Smith but an opponent of his labor-oriented value theory) argued that not only consumption and exchange but even economic growth were driven by purely subjective, mental factors—“an absolute dominance of opinions in the realm of goods and property”—with which individual economic agents valued the goods and services available to them according to their own judgment of their needs and wants.<sup>36</sup> The elements of a subjective theory of value had been present in several eighteenth-century writers on political economy such as Galiani and Condillac, but would achieve acceptance by the economic mainstream in the western European nations only after 1870, and the major exceptions during the nineteenth century were the German legatees of Hufeland such as Rau, the important theorist F.B.W. von Hermann, and, indeed, both Roscher and Knies.<sup>37</sup>

If we now turn to the work of Wilhelm Roscher, it becomes apparent that his conception of political economy is closely related to that of Rau. Generally agreed to be the founder of the

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<sup>35</sup> Lindenfeld, *Practical Imagination*, 85-86; see the contributions of Erich Streissler, Karl Milford, Jochen Schumann, and Birger Priddat in Priddat, ed., *Wert, Meinung, Bedeutung*.

<sup>36</sup> Quoted in Karl Milford, “Hufeland als Vorläufer von Menger und Hayek,” in Priddat, *Wert, Meinung, Bedeutung*, 95; see also Streissler, “Carl Menger, der deutsche Nationalökonom,” 43-44. The key point in Hufeland’s criticism of the Smithians was that economists of his day typically tried to explain value and price by referring to their origins rather than to *conduct*, ignoring the need to explain the valuing behavior of individual actors; Hufeland himself combined this attention to valuing behavior with the German Smithian objectivists’ attention to the means-ends character of goods to arrive at a theory in which goals and purposes were dependent on individual opinions, explaining willing exchanges of differing goods. See Milford, “Carl Menger und die Ursprünge der Österreichischen Schule der Nationalökonomie,” in Reinhard Neck, ed., *Die Österreichische Schule der Nationalökonomie* (Frankfurt: Lang, 2008), 25-64, here 37-40.

<sup>37</sup> The historian Erich Streissler has done more than anyone else to revive awareness of this “proto-neoclassical” tradition in the theory of value among little-known German theorists, and to point to its importance for understanding the later achievement of Carl Menger: see especially Streissler, “Carl Menger, der deutsche Nationalökonom,” and “The Influence of German Economics on the Work of Menger and Marshall,” in Bruce J. Caldwell, ed., *Carl Menger and His Legacy in Economics* (Durham: Duke University Press, 1990). We will discuss Menger’s use and expansion of this tradition of subjective value theory in the following section.

historical approach to economics in Germany owing to the widely read programmatic statement in his *Grundriss* of 1843,<sup>38</sup> Roscher integrated traditional cameralist elements and some degree of attention to historical change and relativity into classical *Nationalökonomie*. The invariably repeated barb that Roscher offered merely “historical sauce on a classical dish” is accurate inasmuch as he based his texts organizationally on Rau and in substance on the economic theory of classical sources from Smith to Rau; Roscher consequently remained closer to the classical economists than did Hildebrand or Knies.<sup>39</sup> Despite being trained by some of the most eminent of German historians, including Ranke and Gervinus, despite initially offering lectures in history himself, and despite his claims to be following in the footsteps of the historical school of jurisprudence under Savigny, Roscher’s own scholarship had almost nothing in common with their careful source-criticism.<sup>40</sup> In what sense, then, was he a “historical” economist? For our purposes, there are two principal senses, both relevant to later debates about the nature of social science.

First and foremost, in expanding on the traditional cameralist aim (also preserved in Rau) of descriptive thoroughness and relevance to the situation of officials in the German states, Roscher argued that the theory of political economy must be appropriate to the full reality of the specific historical forms of economic life which it aimed to explain. That is to say, the classical theory must be broadened to take account of the many “exceptions” to its laws which were apparent in the particularities of the contemporary German situation and of other specific

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<sup>38</sup> Wilhelm Roscher, *Grundriss zu Vorlesungen über die Staatswirthschaft: Nach geschichtlicher Methode* (Göttingen: Dieterichschen Buchhandlung, 1843).

<sup>39</sup> Lindenfeld, “Myth,” 406-407. One of the rare *Dogmenhistoriker* to dissent from this famous critique of Roscher (first made by the economist Robert Wilbrandt, an opponent of Weber in the *Werturteilsstreit*) is Karl Brandt, *Geschichte der deutschen Volkswirtschaftslehre*, vol. 2 (Freiburg: Haufe, 1993), 54, though he does not really provide much evidence against its accuracy.

<sup>40</sup> Lindenfeld, *Practical Imagination*, 154-155. The views of Savigny’s historical school of jurisprudence are sketched below in Chapter Four, Section I.



economic orders throughout history.<sup>41</sup> For Roscher, this task involved introducing a more well-rounded view of the individual and above all of the nation. It meant that in explaining individual economic actions, political economy must take into account not just the motive of self-interest and the surrounding “real” (economic, political, and social) factors affecting action, but “ideal” factors as well, especially moral and religious ones.<sup>42</sup> By extension, as Roscher recurrently emphasized, the inextricable interconnection of individuals with their social, political and cultural surroundings meant that the economist *must* account for the effects of national culture and characteristics on the shaping of the economy.<sup>43</sup> For instance, Roscher sought to demonstrate by historical example that contrary to the opinions of the classical economists, there was no natural rate of wages set at a minimum subsistence level, and that the appropriateness of free trade or protection depended on the cultural “level” of the nation in question.<sup>44</sup> He followed certain currents of his day in conceiving of these necessary interconnections in the form of organic and biological analogies. According to him, the *Volk* or people formed a real whole or totality, whose parts (including individuals and collective entities in the economic, political and other realms) cohered internally and could be explained only in terms of mutual causality, and which indeed could be seen as a multigenerational and living unity.<sup>45</sup> Roscher was fond of making the claim that history, and thereby historical economics, was like physiology writ large.

Second, Roscher sought to introduce a historical element into his understanding of the types of regularities in economic life which it was political economy’s task to describe. If it was

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<sup>41</sup> Gottfried Eisermann, *Die Grundlagen des Historismus in der deutschen Nationalökonomie* (Stuttgart: Enke, 1956), 151-52. It is worth noting that Roscher had favorable comments to make about the historical awareness of some of the classical economists, preeminently Smith and Malthus, at least in his earlier years—his aim was not to overturn classical theory but to put it onto more secure foundations, as he saw it: *ibid.*, 130-31.

<sup>42</sup> *Ibid.*, 155; Winkel, *Nationalökonomie*, 94.

<sup>43</sup> See the comments on Roscher’s methodology in Milford, “Carl Menger und die Ursprünge der Österreichischen Schule der Nationalökonomie,” 47-49.

<sup>44</sup> Winkel, *Nationalökonomie*, 94-95.

<sup>45</sup> Eisermann, *Grundlagen*, 139-42, 153, which also notes his interest in Hegelianism.

mistaken to think that the “laws” of economic life proposed by the classical economists and their vulgarizers were in fact universally applicable to economic agents in all societies, perhaps a lawful pattern could still be discerned in the development of different societies. Roscher sought partially, then, to substitute diachronic laws for synchronic laws of political economy, and he proposed to employ a comparative method to analyze the raw data of different societies’ developmental histories in order to discover such laws.<sup>46</sup> The aim was to establish “a sort of comparative morphology” of national economic development, as Lindenfeld has put it.<sup>47</sup> Roscher adopted a simple framework of stages based on the predominant factors of production—“nature,” labor, and capital—and his use of biological-organic metaphors inclined him toward a cyclical view of growth, maturity, and decline.<sup>48</sup> Although he did in fact successfully introduce discussion of historical variations into the standard subjects of the cameralist manuals—for instance, dealing with the development of agriculture from primitive farming to the end of feudalism, and of manufactures and commerce from the medieval town to the decline of guilds and the growth of modern banking—he did not come close to undertaking exhaustive historical-comparative studies for the purpose of building up the concepts of economic theory by induction as he implied.<sup>49</sup> If his attempts to discern lawfully recurring stages of development were characteristic of his day,<sup>50</sup> and soon regarded as antiquated,<sup>51</sup> the desire to present a plausible account of the historical development of different economic systems was a bequest of great use to Schmoller and others who followed him.

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<sup>46</sup> Milford, “Carl Menger und die Ursprünge der Österreichischen Schule der Nationalökonomie,” 48-49. For a brief summary Roscher’s position, see Winkel, *Nationalökonomie*, 94-95.

<sup>47</sup> Lindenfeld, “Myth,” 406.

<sup>48</sup> Eisermann, *Grundlagen*, 154-55.

<sup>49</sup> Lindenfeld, *Practical Imagination*, 156.

<sup>50</sup> Ibid., noting that “in their Whiggishness and their all-inclusiveness, they were akin to the schemes of Comte in France and Spencer in England of the same era.”

<sup>51</sup> Eisermann, *Grundlagen*, 132-35, calls attention to Roscher’s explicit consideration of divine intent in history and the discrepancy between the calls for empirical-historical investigation oriented toward the individual and the biological-cum-religious philosophy of history approach oriented toward larger “wholes” on the other.

Hildebrand and Knies produced their own statements calling for the use of historical methods in political economy in the decade following the publication of Roscher's *Grundriss*, and although they differed from Roscher and from each other in their views on the proper task of economics, the themes they struck were similar. The slightly older Hildebrand, who began his career as a historian, was both more radical than Roscher—a democratic delegate at the Frankfurt Parliament, he was dismissed from his position at Marburg after 1848 and had to teach for a time in Switzerland—and found it more to his liking to set up institutes and journals than to pursue sustained scholarship.<sup>52</sup> Addressing economic topics already by about 1840, Hildebrand came to oppose the classical school in its English and German incarnations because of what he saw as its inapplicability to German particularities and the mistaken “one-sidedness” of its materialistic, utilitarian psychology, which denied the ethical and religious motives that drove socially-embedded human actors.<sup>53</sup> Charging the classical economists with abstraction and “cosmopolitanism,” an epithet which he also directed at contemporary socialism in his 1848 *Nationalökonomie der Gegenwart und Zukunft*,<sup>54</sup> he called like Roscher for greater attention to “reality” as seen concretely in particular histories and national varieties.<sup>55</sup> In Hildebrand's case, this meant the greater use of history and of statistics (then still divided into separate descriptive and quantitative forms) in building a less “abstract” economic theory, and he even set up an institute for statistical research.<sup>56</sup> But although he himself later produced a historical study of the German wool industry, his opposition to classical categories left him with nothing but eclecticism and casuist explanations to offer in place of theory.<sup>57</sup>

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<sup>52</sup> Ibid., 160-64; Lindenfeld, “Myth,” 408.

<sup>53</sup> Ibid., 164-65.

<sup>54</sup> Bruno Hildebrand, *Die Nationalökonomie der Gegenwart und Zukunft*, vol. 1 (Frankfurt: Rütten, 1848). There were no further volumes.

<sup>55</sup> Eisermann, *Grundlagen*, 169-70.

<sup>56</sup> Lindenfeld, “Myth of the Historical School,” 408.

<sup>57</sup> Eisermann, *Grundlagen*, 167, 170.

Knies, the most methodologically sophisticated of the three, shared Hildebrand's rejection of the universalism of classical theory, though he was far from denying the validity of theory in general or proposing an inductive historical-statistical method analogous to Hildebrand's program.<sup>58</sup> For Knies, the problem with classical political economy, and the socialist economics which he saw as its natural extension, lay in the "absolutism" and "perpetualism" of the theory; that is to say, the aim to generate laws valid "for all times and for all peoples."<sup>59</sup> In *Die politische Oekonomie vom Standpunkte der geschichtlichen Methode* (1853), Knies agreed that economics should formally expand its attention to the full range of motives and non-economic influences which shaped economic phenomena in real, particular situations. This emphatically included his predecessors' call for greater attention to the ways in which national culture and state activity conditioned particular economic systems, and he even shared Roscher's holism to a degree, claiming that the economy could be understood as one of the mutually-conditioning (*wechselseitige*) parts of the totality or "living organism" of the *Volk* across multiple generations.<sup>60</sup> But, as Hennis has pointed out, Knies's work was noteworthy for its further elaboration of the idea of economics as a science of the "whole man" which set out from an interpretive understanding of individual action: studying neither the internal connections of ideas nor the purely physical, material activities of human beings, but rather the ways in which individual mental states affect economic actions in historically specific contexts.<sup>61</sup> He was one of the first to consider the differences between *Naturwissenschaft*, *Geisteswissenschaft*, and *Staats- oder Sozialwissenschaft*, and their appropriate domains, in a manner that led beyond vague analogy,

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<sup>58</sup> Several historians have called attention to the fact that Knies was himself a noted theorist, particularly in his influential *Geld und Credit* (1873): e.g., Lindenfeld, "Myth," 409-10; Gottfried Eisermann, *Max Weber und die Nationalökonomie* (Marburg: Metropolis, 1993), 26.

<sup>59</sup> Eisermann, *Grundlagen*, 202-203.

<sup>60</sup> *Ibid.*, 194-96, 201.

<sup>61</sup> Hennis, "A Science of Man," 43.

anticipating the concerns which would soon be associated with Dilthey, Windelband, Rickert—and Menger.<sup>62</sup> For Knies, the analytical device of self-interested economic man was not useful for such situation-specific explanation of human action since it “de-natured” the individual and made it impossible to explain what was actually occurring; instead, the intermediary *Staatswissenschaften*, including political economy, must take into account the full range of human motives, especially including ethical and religious views but also culturally and racially influenced modes of thinking, alongside material differences if it were to explain human actions correctly.<sup>63</sup>

Neither Hildebrand nor Knies, however, was content to rest with idiographic historical descriptions of situationally-specific economic phenomena; both continued Roscher’s initial effort at discovering developmental laws in the absence of universally binding synchronic laws of economics. Hildebrand put forward a stage theory of types of economic order, ranging from the “natural” to the money economy and ending in the economy based on credit. Although he intended his theory to apply to all societies’ linear developmental processes, and to demonstrate the existence of lawful regularities—thereby reintroducing a diachronic form of universalism—he neglected the fact which should have been clear to him as a historian that these “stages” clearly overlapped and even recurred under certain circumstances.<sup>64</sup> Like Hildebrand and unlike Roscher, in the 1853 edition of his book Knies’s liberal orientation toward moral and political progress was reflected in the contention that political economy aimed to discover laws of linear development through comparative study.<sup>65</sup> But the second edition of 1883 evinced much more skepticism: while retaining the search for “tendencies” and “analogies” between different

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<sup>62</sup> Lindenfeld, *Practical Imagination*, 185-86.

<sup>63</sup> Eisermann, *Grundlagen*, 196, 199-200, 208-209; Hennis, “A Science of Man,” 43-46.

<sup>64</sup> Winkel, *Nationalökonomie*, 96-97; Eisermann, *Grundlagen*, 172-73.

<sup>65</sup> Eisermann, *Grundlagen*, 197-99.

societies' patterns of economic development, which he saw as an appropriate intermediary position between the laws generated by natural science and the complete "freedom" (based on human free will) of the *Geisteswissenschaften*, Knies now rejected the notion that economics could yield developmental *laws*. The change in the book's title between editions is thus significant: no longer aiming at *Political Economy from the Standpoint of Historical Method*, Knies now proposed *Political Economy from the Historical Standpoint*, disclaiming any particular historical "method" of discovering laws. Thus, the thrust of his later argument was the emphasis on limited and local regularities and the historical relativity of different economic "tendencies," which may, as Menger thought, have led ultimately to an abdication of the search for any theory at all.<sup>66</sup> Even if that was going too far, and even though Knies himself continued to work in economic theory, his methodological position suggested at most the possibility of theories of the "middle range."

The positive methodological contribution of the older historical economists to the later doctrine of value-freedom, so far as there was one, clearly lay more in the impetus they gave to the ideal of an interpretive and historical social science which must take culture and individual human motives into account, than in any substantive treatment of the elements of the value-freedom complex. The work of Roscher, Hildebrand and Knies was certainly still carried out under the influence (if not entirely within the confines) of the old moral-political sciences, oriented toward practical wisdom as much as toward theoretical knowledge, from which vantage point the search for a "value-free" science would seem strange at best.

Some hints of future developments were, certainly, present in these three men alongside their desire for a normative "ethical" economics. No member of the trio held subjectivist views regarding human values in general, but all three exhibited relativist tendencies and accepted the

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<sup>66</sup> Ibid., 209-214; see also Lindenfeld, *Practical Imagination*, 185.

relevance of individual subjective perceptions of needs to a determination of economic value. Roscher's worldview was much like Ranke's, as the principal study of the older historical economists makes clear: Roscher's strong Lutheran piety allowed him, like the great historian, to consider each epoch and form of sociopolitical order on its own terms, but simultaneously to see it as immediate to God, thereby ensuring a form of unity beneath historical relativity.<sup>67</sup> Knies's historical relativism, and especially Hildebrand's, which saw in each epoch and in each national form the criteria for an endogenous judgment of its economic order, were attenuated by their basic liberal convictions of constant progress.<sup>68</sup> Like Roscher, Hildebrand adopted the German approach to theory of economic value deriving from Hufeland and, even, it has been claimed, anticipated the marginal utility theory.<sup>69</sup> Knies, in demanding the end of the "absolutism of theory," also criticized classical objective theories of value, and emphasized the wide variance in needs across individuals, classes, and nationalities, writing that "Value does not depend only on the definite quantities of given goods with definite characteristics, but on the relation of these to the concrete needs of people."<sup>70</sup> But none of the three took either of these positions in the direction of a general philosophical stance of value subjectivism.

As for the component elements of value-freedom itself, Roscher in fact accepted a version of the distinction between *Sein* and *Sollen*, "Is" and "Ought." Perhaps, as Tribe has suggested, this was owing to the separation of pure and applied political economy in his organizational schema, since several historians have remarked on Roscher's unusual reluctance

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<sup>67</sup> Eisermann, *Grundlagen*, 122-23.

<sup>68</sup> Ibid., 176, 229.

<sup>69</sup> Ibid., 167; Streissler, "Carl Menger, der deutsche Nationalökonom," 57-59, 66; In his first effort at doctrinal history, Schumpeter also suggested that Hildebrand might be considered an anticipator of the theory—though, he thought, without much justification: Schumpeter, *Economic Doctrine and Method*, trans. R. Aris (New York: Oxford University Press, 1967 [1914]), 158.

<sup>70</sup> Ibid., 203; quoted in Lindenfeld, *Practical Imagination*, 189. See also Brandt, *Geschichte der deutschen Volkswirtschaftslehre*, 61-62 for a very brief overview of Knies' views on subjective value-in-use.

to take partisan stands on policy questions.<sup>71</sup> But he did sometimes do so, and Lindenfeld's argument that this reluctance may have more to do with his quietist religious views and concern about the impossibility of knowing God's plan is quite plausible in light of Roscher's explicit consideration of divine governance in his work.<sup>72</sup> Regardless, Roscher was very clear that he believed that political economy was a moral-political science like the other *Staatswissenschaften*—equally “ethical” and “*geistig*” in its orientation—whose purpose was not simply to study the production of wealth but “to judge men, to rule over men.”<sup>73</sup> With this conception of science, and in the absence of value subjectivism, the separation of Is and Ought could not lead to any conviction that value judgments must be avoided, but only, as in Rau, to the need to make the “correct” value judgments.

Hildebrand and Knies, meanwhile, shared the notion of political economy as a normative, “ethical” science, without even continuing Roscher's separation of Is and Ought. Hildebrand, the most politically active of the three and the only one who would later join the Verein für Sozialpolitik, argued in the context of his stage theory that the third stage—the credit economy—contained within itself the solution to the “social question.” Credit was an economic category with inextricably moral connotations connected to character and trust, and if it could be apportioned according to both moral and practical considerations, as Hildebrand insisted, workers who showed sufficient moral fiber would have access to the credit necessary to start their own small enterprises and lift themselves out of poverty.<sup>74</sup> Knies believed that only a historical reinterpretation of the classical theory could allow political economy to retain what

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<sup>71</sup> Lindenfeld, “Myth,” 407; on Roscher's politics, see Guido Woelky, “Das Politikverstaendnis von Wilhelm Roscher,” in Hans Lietzmann and Peter Nitschke, eds., *Klassische Politik* (Opladen, 2000), 217-234.

<sup>72</sup> Ibid., 407; id., *Practical Imagination*, 174; Eisermann, *Grundlagen*, 144, 147-50, which emphasizes Roscher's indecisiveness on the matter of the appropriateness of making policy recommendations.

<sup>73</sup> Quoted from a letter of 1840 in Eisermann, *Grundlagen*, 130-31, and from the preface to the *Grundriss* in Tribe, *Governing Economy*, 205.

<sup>74</sup> Brandt, *Geschichte der deutschen Volkswirtschaftslehre*, 59; Eisermann, *Grundlagen*, 176-77, 180; Lindenfeld, *Practical Imagination*, 191.



was valuable in the classical tradition and simultaneously to conquer the twin threats of socialism and the class antagonism introduced by capitalism under the promotion of self-interested action alone. Political economy was necessarily therefore an “ethical” science, one which might very well deal with questions of *Sollen* as well as *Sein*, and which embraced the historical-relativist but not “value-free” notion that the historically conditioned phenomena of economic life called forth historically appropriate institutions and policy measures for their proper management.<sup>75</sup> Such views should not seem unfamiliar to anyone acquainted with the work of Schmoller, who, though born only in 1838 and never a student of any of these three men, nonetheless felt an affinity with their work and was not reticent in saying so.<sup>76</sup> All four of them formed their views in partial opposition to classical political economy, and especially to the vulgarized form (“*Manchestertum*”) that aimed to imbue a normative doctrine of universal harmony based on self-interested action with the authority of a universal economic science.<sup>77</sup> That they did not advance claims of value-freedom for their own economic work in opposition to this normative doctrine is well worth observing—it suggests that one cannot interpret the value-freedom doctrine merely as a tactical ideological response, *available at all times much like the claim to be free of bias*, to a dominant mode of normative “discourse.” Though claims to value-freedom

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<sup>75</sup> Eisermann, *Grundlagen*, 205, 214, 222, 229.

<sup>76</sup> See *ibid.*, e.g. 185. Although it seems he had the most affection for Roscher, methodologically Schmoller was probably closest to the later Knies.

<sup>77</sup> This was certainly one of the main links between the older historical economists and those active in the Verein für Sozialpolitik: see e.g., Winkel, *Nationalökonomie*, 82-84; Balabkins, *Not By Theory Alone*, 26-29. The older body to which the Verein was formed in opposition, the Volkswirtschaftliche Kongress, took its guidance from John Prince-Smith and the more doctrinaire liberal economists in the era of the Verein’s founding: on the Kongress and Prince-Smith, see Volker Hentschel, *Die deutschen Freihändler und der volkswirtschaftliche Kongress, 1858 bis 1885* (Stuttgart: Klett, 1975); see also Grimmer-Solem, *Rise of Historical Economics*, 173-174, and for Schmoller’s critical attitude toward classical economics, 137. It is also worth observing here that this opposition to normative economic liberalism need not at all be identified with a Romantic reaction against the Enlightenment, a charge occasionally made against the German historical economists, as Grimmer-Solem, 31-32, rightly points out. Though the links between the older historical economists and Romantic writers on economic and social problems such as Adam Müller are worthy of investigation, their grounding in the pre-Romantic *Staatswissenschaft* tradition of moral-political science is sufficient to explain their opposition, while the above remarks should also indicate that they were by no means opposed either to tempered liberal political or economic aims.

may of course serve an ideological function, the doctrine itself presumes a preexisting commitment to at least some particular set of philosophical beliefs about the subjectivity of values, the relations of Is and Ought, fact and value, theory and practice, and the nature of science. Such commitments are themselves historically conditioned and were not all “live options” for the historical economists discussed here, who consequently could make no use of the doctrine, even should they have wanted to, in opposing vulgarized economic liberalism. Be that as it may, Schmoller both accepted and furthered their notion of an “ethical” political economy in opposition both to normative *Manchestertum* and to forms of socialism based on class conflict, while taking the notion of historical economics away from mere “historical standpoints” and toward “historical method.”

Let us begin with the latter point, namely Schmoller’s views on the methodology of historical economics and the interaction of history and theory. Schmoller accepted the notion of political economy as a social science of the “whole man,” to use Hennis’s phrase, and through his powerful academic position in German economics he helped to create the right conditions for the pursuit of an “interpretive” science of political economy, starting out from the value-oriented, subjectively meaningful actions of human agents operating within a social context, which would be embraced in different ways by the value-freedom advocates, including Menger as we will see below.<sup>78</sup> This is *not* to say that Schmoller’s social science of the “whole man” can be identified with the “interpretive” social science of the value-freedom advocates; they differed, pivotally, on the question of the appropriate place for theory, and to some degree on the methodological status

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<sup>78</sup> The impact of Schmoller’s historical economics in particular is obvious in the case of the historically-nuanced *Sozialökonomik* (social economics) represented by Weber and by Schmoller’s student Sombart. Weber acknowledged Schmoller’s impact on this program in his often-cited letter of 23 June 1908: MWG II/5, *Briefe 1906-1908*, 594-595; see also Manfred Schön, “Gustav Schmoller and Max Weber,” in Mommsen and Osterhammel, *Max Weber and his Contemporaries*, 59-60. To suggest that Menger’s work can be seen as related to this search for an interpretive social science, even if to a lesser degree than Weber, is more controversial, and will be justified below in Section II.

of the individual.<sup>79</sup> But despite the fact that Schmoller explicitly used the Comtean rhetoric of the passage from a “metaphysical” to a “positive” stage of social scientific enquiry, and although he was an admirer of statistical research, like all the German historicists he rejected the statistical-determinist positivism of an H.T. Buckle.<sup>80</sup> Schmoller’s version of the “science of man” was both hermeneutical and strongly empirical; it rejected “abstraction” and favored exhaustive description of the full range of historically contingent human motives and institutions, utilizing the results of contemporary psychology; and it rejected universal laws reached through “speculation,” while proposing instead inductively grounded regularities which would permanently retain their truth value—that is, they would not be historically relativized at some future time.

Taking these points in turn, we observe that the strong affinities which Schmoller had to positivist modes of thought should not distract from the inescapable interpretive element that remained in his vision of science.<sup>81</sup> Rather than relying exclusively on analogies to the natural sciences, he maintained the philosophical-sociological character of political economy, emphasizing that a truly scientific economics must aim at understanding human beings who were

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<sup>79</sup> Here I strongly disagree with Hennis, who tends to identify the “science of man” with the interpretive social science associated most closely with Weber, in a way that makes the notion of “value-free” science irrelevant or at least difficult to comprehend (and that, incidentally, explains how Hennis can suggest that Weber derived the notion of value-freedom from Knies, which he certainly did not): Hennis, “A Science of Man,” 51-52.

<sup>80</sup> Schmoller frequently invoked Comte in his principal methodological investigation, “Die Volkswirtschaft, die Volkswirtschaftslehre und ihre Methode,” (1893), reprinted in Schmoller, *Über einige Grundfragen der Socialpolitik und der Volkswirtschaftslehre* (Leipzig: Duncker & Humblot, 1898), 213-314; this long essay went through several editions, but we use the 1893 edition here. As for Buckle, he noted in his main survey work that the “frequently made effort to reduce [mental causes] to [material causes], as the materialists like Buckle have done... or as with the Marxists who believe themselves able to explain all higher cultural life on the basis of economic production, will always come to grief.” Schmoller, *Grundriss der allgemeinen Volkswirtschaftslehre, Erster Teil* (Leipzig: Duncker & Humblot, 1908), 107.

<sup>81</sup> Harald Homann, “Gesetz und Wirklichkeit in den Sozialwissenschaften: Vom Methodenstreit zum Positivismusstreit,” Dissertation, Tübingen, 1989, 119-20; 165; Winkel, *Nationalökonomie*, 87.

moral actors shaped not just by habits and institutions but by mental states.<sup>82</sup> The economy and other domains of social reality could not be understood solely from the “outside,” but rather by taking into account the *mutual* conditioning of mental states and material conditions, particularly the ways in which moral beliefs are embedded in customs and institutions.<sup>83</sup> A non-determinist who took human free will as a datum, Schmoller was nonetheless more interested in social groups and institutions than in individual agents; he would criticize Menger for ignoring that economic phenomena were accessible only to the “collectivistic consideration” of history and statistics which gave due weight to institutions.<sup>84</sup>

These views, characteristic of the German historicist tradition, inoculated Schmoller against the more behaviorist strains of the mid-century positivism to which he might otherwise have succumbed. Schmoller began his education and did his early work in the 1850s and 1860s at the high point of nineteenth-century positivism. Like many of his peers among the “younger” historical economists in the Verein für Sozialpolitik, he attended the seminar of the extremely influential Berlin statistician Ernst Engel, who instilled in Schmoller, Brentano, G.F. Knapp and others a belief in the necessity of conducting detailed empirical inquiries to gain reliable information about social problems as the basis for any possible reform efforts.<sup>85</sup> His educational background was in the historical *Staatswissenschaften*, with little theoretical *Nationalökonomie*, and between this type of training and Engel’s, Schmoller was strongly conditioned to see

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<sup>82</sup> Schmoller, “Die Volkswirtschaft, die Volkswirtschaftslehre und ihre Methode,” 226; id., “Wechselnde Theorien und feststehende Wahrheiten im Gebiete der Staats- und Sozialwissenschaften und die heutige deutsche Volkswirtschaftslehre,” (1897), reprinted in *Über einige Grundfragen*, 315-43; here 332-38.

<sup>83</sup> Heino Heinrich Nau, “Gustav Schmoller’s *Historico-Ethical Political Economy*: Ethics, Politics, and Economics in the Younger German Historical School, 1860-1917,” *European Journal of the History of Economic Thought* 7:4 (Winter 2000), 507-531, here 516-17.

<sup>84</sup> Schmoller, “Die Schriften von K. Menger und W. Dilthey zur Methodologie der Staats- und Sozialwissenschaften,” in Schmoller, *Zur Litteraturgeschichte [sic] der Staats- und Sozialwissenschaften* (Leipzig: Duncker & Humblot, 1888), 275-304; here 287; see also Nau, “Gustav Schmoller’s *Historico-Ethical Political Economy*,” 514-15.

<sup>85</sup> Grimmer-Solem, *Rise of Historical Economics*, Ch.4, esp. 129-32.

empirical studies as the epitome of “good science.”<sup>86</sup> It was Schmoller’s admiration for this nonsense mid-century empiricism that gave him his abiding dislike for general theory or “abstraction,” which to his opponents’ bemusement he consistently connected with the idealistic metaphysical speculation against which the positivists had turned.<sup>87</sup> His rejection both of classical economic theory and of the work done by Carl Menger must be seen in this light.<sup>88</sup>

Against abstract theory, Schmoller ranged the ideal of historical economics as a “descriptive science,” as he put it.<sup>89</sup> The task of economics was not to identify single human motives or single causes of economic phenomena, but to gather the completest possible survey of actually occurring motives and causes, categorize them, and only then to proceed to theory.<sup>90</sup> When Schmoller remarked on “exact” science in his dispute with Menger, it was to this exhaustive empirical research that he referred.<sup>91</sup> If economics now focused on such empirical research, Schmoller replied to Menger, “It is in no way a neglect of theory, but rather the

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<sup>86</sup> Rüdiger vom Bruch, “Gustav Schmoller: Zwischen Nationalökonomie und Geschichtswissenschaft,” in id., *Gelehrtenpolitik, Sozialwissenschaften und akademische Diskurse in Deutschland im 19. und 20. Jahrhundert* (Stuttgart: Steiner, 2006), 230-49, here 242; Grimmer-Solem, *Rise of Historical Economics*, 127-35 on Schmoller and his peers.

<sup>87</sup> Nau, *Eine “Wissenschaft vom Menschen”*, 57-59; Grimmer-Solem, *Rise of Historical Economics*, 124; Schmoller, “Methodologie der Staats- und Sozialwissenschaften,” 287, 292.

<sup>88</sup> Schmoller suggested in his review of Menger, in an eminently characteristic statement, that abstraction is indeed necessary in economics, but it must be abstraction from the full reality of economic life, and not an attempt to produce scholastic phantoms (a barb directed at Menger’s Aristotelian realism): Schmoller, “Methodologie der Staats- und Sozialwissenschaften,” 283. For Schmoller’s anti-“abstraction,” anti-utilitarian, and anti-universalist critiques of the classical economists, see “Die Volkswirtschaft, die Volkswirtschaftslehre und ihre Methode,” 244, 300; Homann, “Gesetz und Wirklichkeit,” 116.

<sup>89</sup> Winkel has suggested that Schmoller himself drew methodological support from the “cultural science” orientation of Windelband and Rickert, presumably because of the identification of this descriptive method with the “idiographic” orientation discussed above in Chapter 1: Harald Winkel, “Grundlagen nationalökonomischen Denkens um die Jahrhundertwende,” in Gerhard Sprenger, et al., eds. *Deutsche Rechts- und Sozialphilosophie um 1900. Archiv für Rechts- und Sozialphilosophie Beiheft 43* (Stuttgart: Steiner, 1991), 18-28, here 24. Winkel offers no concrete evidence for this contention, and while the ideal of idiography does approach Schmoller’s pure “description,” the essential feature which differentiated “cultural science” from the older historicist viewpoint was the notion of value-relevance and the associated recognition of the need for theory, which was importantly absent or at least undeveloped in Schmoller and constitutes one of the principal differences between him and the value-freedom advocates, as this chapter will argue.

<sup>90</sup> Schmoller, “Methodologie der Staats- und Sozialwissenschaften,” 278, 284; id., “Die Volkswirtschaft, die Volkswirtschaftslehre und ihre Methode,” 223.

<sup>91</sup> Ibid., 280; Rüdiger vom Bruch, “Nationalökonomie zwischen Wissenschaft und öffentlicher Meinung im Spiegel Gustav Schmollers,” in id., *Gelehrtenpolitik, Sozialwissenschaften und akademische Diskurse*, 311-31, here 319-20.

necessary foundation [*Unterbau*] for it.”<sup>92</sup> As a progressive science, political economy ought to base itself on the latest findings of the neighboring *empirical* sciences, especially psychology, which could aid in the attempt to understand the “whole man” and place the one-sided assumption of economic man in the past where it belonged.<sup>93</sup> Generally in the form of monographic studies of historical and contemporary themes, the efforts Schmoller envisioned were to form the bricks for the wall of a completed theory sometime far in the future.<sup>94</sup> In this hypothetical future state, the task of induction would be complete and scientific knowledge would take the form of a pure “rationalism” based on deduction from empirically secured propositions, while a universal-historical perspective would provide knowledge of comparative developmental laws. Until and unless humanity reached such a state, however, social scientists must be alert to the empirical grounding of their inescapably tentative theories.<sup>95</sup> Indeed, it was one of Schmoller’s principal disagreements with Roscher and Hildebrand that they strove for such a universal-historical perspective too quickly, thereby continuing the classical vice of theorizing without enough fundamental research to provide the data necessary for theory construction in the first place.

But although Schmoller may have advanced beyond his predecessors in the carefulness of his historical research and in his unwillingness to proclaim a stage theory of development on the basis of scanty data and speculation, he fell behind them in his views on the role of theory in economics. As several scholars have observed, Schmoller’s “descriptive” ideal was a highly naïve form of empiricism. Not only was his program of “summarization of historical data” essentially interminable—induction by its nature can never be a “completed” process—but he

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<sup>92</sup> Ibid., 279.

<sup>93</sup> Nau, “Gustav Schmoller’s *Historico-Ethical Political Economy*,” 515.

<sup>94</sup> Vom Bruch, “Gustav Schmoller: Zwischen Nationalökonomie und Geschichtswissenschaft,” 240-41.

<sup>95</sup> Ibid., 240-41; Schmoller, “Die Volkswirtschaft, die Volkswirtschaftslehre und ihre Methode,” 230.

ignored the constitutive role necessarily played by theoretical assumptions in the discernment of any historical facts whatsoever. In practice, of course, he too used elements of preexisting theory to order his historical data, but did so eclectically, without system or consistency.<sup>96</sup> The denigration of theory kept Schmoller from reaching the insight that because even a science of the “whole man” could never hope to take *every* detail into account, some (theory-based) criterion for the selection of historical or social significance must be supplied by the investigating scholar. Schmoller’s naïve empiricism thereby had implications not only for his methodology of historical economics but also for his views on objectivity, as we shall see, since the introduction of subjectivity into scholarly findings was not as he thought merely the result of partisan posturing but an unavoidable feature of the process of determining which facts to highlight.

We have already observed that regarding the different elements of the value-freedom complex proper—the split between Is and Ought, theory and practice, ends and means, and so forth—Schmoller stood in sharp contrast to the other figures considered in this dissertation. Schmoller believed in a normative, “ethical” science of political economy. The foregoing discussion has shown that Schmoller opposed his empirical “descriptive” political economy to economic *theory*, and the way he did so is relevant to his views on the core value-freedom distinction of “*theory vs. practice*.” The major link between these two connotations of “theory” lies in the fact that for Schmoller, general theory was associated with the Manchesterite doctrine of social harmony from self-interest, which served as an impediment to the state-initiated social reforms that he believed essential.<sup>97</sup> Following Engel, Schmoller believed that the empirical-

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<sup>96</sup> Yuichi Shionoya, “A Methodological Appraisal of Schmoller’s Research Program,” in id., *The Soul of the German Historical School: Methodological Essays on Schmoller, Weber, and Schumpeter* (New York: Springer), 22; Vom Bruch, “Gustav Schmoller: Zwischen Nationalökonomie und Geschichtswissenschaft,” 243-44; Balabkins, *Not By Theory Alone*, 74.

<sup>97</sup> Grimmer-Solem, *Rise of Historical Economics*, 124, 137; Nau, *Eine “Wissenschaft vom Menschen,”* 55-56; Winkel, “Grundlagen nationalökonomischen Denkens,” 22.

statistical approach allowed for a closer connection between the social scientist and the social problems of the day, and thus bent economics toward direct involvement in the alleviation of those problems—toward practice and away from theory.<sup>98</sup> He was quite forthcoming about the direct relation between scientific work and the promotion of particular reforms and particular social values that he deemed ethical. In 1870 he called for an “ethical justification [*Begründung*] for political economy,” and years later, in 1897, he wrote with pride that “the study of political economy [*Geschäftsnationalökonomie*, having connotations of the private economy] has once more become a moral-political science, in which the aspiration to position itself in the standpoint of the common good and the whole development of the nation and humanity now dominates.”<sup>99</sup> In this effort, “German science has done nothing but attempt to provide the causal grounding and strict proof of truth to the immemorial ethical-religious and legal-governmental [*rechtlich-staatlichen*] imperative” of reform, he wrote in 1897.<sup>100</sup> Schmoller was thus a strong believer in “engaged” scholarship.<sup>101</sup> This belief in the purportedly direct transition between scientific results and policy recommendations was common in the Verein für Sozialpolitik,<sup>102</sup> has

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<sup>98</sup> For instance, in his 1881 statement upon taking up the editorship of the journal later to be known as *Schmollers Jahrbuch*, he wrote that his policy would be to intensify the attention given to current social problems so as to make political economy serve as a “light” to practical life: Schmoller, “Über Zweck und Ziele des Jahrbuchs,” *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft* 5 (1881), 1-18, here 2. See also Abraham Ascher, “Professors as Propagandists: The Politics of the Kathedersozialisten,” *Journal of Central European Affairs*, 23:3 (Oct. 1963), 282-302, here 284-85.

<sup>99</sup> Schmoller (1870) quoted in Nau, *Eine “Wissenschaft vom Menschen,”* 59; Schmoller, “Wechselnde Theorien,” 338, also cited by Winkel, “Grundlagen nationalökonomischen Denkens,” 24, without attribution.

<sup>100</sup> Schmoller, “Wechselnde Theorien,” 343. For more comments on Schmoller’s “ethical” political economy, see also Grimmer-Solem, *Rise of Historical Economics*, 137-41; Ascher, “Professors as Propagandists,” 290. Nor was Schmoller alone in this view; Adolf Wagner, with whom he sometimes disagreed on matters of method, shared his intermingling of moral assertion with economic research: Karl Erich Born, “Wissenschaft und politisches Werturteil im Deutschland des 19. Jahrhunderts,” in Karl Ulmer, ed., *Die Verantwortung der Wissenschaft* (Bonn: Bouvier, 1975), 92-121, here 109.

<sup>101</sup> Born, “Wissenschaft und politisches Werturteil,” 92-93; Grimmer-Solem, *Rise of Historical Economics*, 247-48.

<sup>102</sup> In the unfinished chapter on “Sozialpolitik and the Historical Method” in his landmark *History of Economic Analysis* (New York: Oxford University Press, 1954), 804, Schumpeter remarks that in the Verein’s monumental series of *Schriften* on various social problems, many of them “took no end of trouble with their facts, but most of them went straight from their impressions of the factual pattern to recommendations, just as would have any nonprofessional worker.”



remained popular,<sup>103</sup> and helps to explain why Schmoller and his admirers tended and tend to assume that economists interested in economic theory must be opposed to social policy.

It was quite fortunate for Schmoller that the dictates of “ethical” political economy seemed so frequently to conform to his notions of what was ethical instead of his opponents’ notions. Schmoller was a moderate conservative, monarchist, and “social imperialist” who believed in a strong, highly active state; the latter would reduce class tensions by pursuing factory legislation and social insurance, by protecting craft industry through tariffs and regulation, and by introducing greater economic egalitarianism, thereby reconciling the lower classes to the monarchy and the social order.<sup>104</sup> He was obviously aware that a plethora of conflicting opinions on social policy was available even among his closer colleagues, from the nationalizations favored by the conservative state-socialist Adolf Wagner to the “social liberal” trade unionism of Brentano, and it has been suggested by Yuichi Shionoya that the phrase “ethical political economy” signified merely the inclusion of ethical motives into economic analysis as necessary features of the “whole man”—as facts to be explained.<sup>105</sup> This would in turn imply that Schmoller’s economics made no normative claims, owing to the historical relativity of ethical beliefs. While Shionoya’s “rational reconstruction” of Schmoller may make him more palatable to those concerned about value-freedom, it does not really describe what he

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<sup>103</sup> Attempts to revive the notion of a morally-inflected economics have had much to do with the revival of interest in Schmoller; as Vom Bruch pointed out around the time of the Schmoller sesquicentennial, much less interest had been shown in Schmoller’s scientific or methodological program than in his activity as a *Kathedersozialist*: Vom Bruch, “Nationalökonomie zwischen Wissenschaft und öffentlicher Meinung,” 312, n.5. Although this may not be as true today, even more recent work on Schmoller starts off from the assertion that economics should be assessed on the basis of its policy relevance in addressing social problems: Grimmer-Solem, *Rise of Historical Economics*, 14 and passim; Peter Koslowski, ed., *The Theory of Ethical Economy in the Historical School: Wilhelm Roscher, Lorenz von Stein, Gustav Schmoller, Wilhelm Dilthey and Contemporary Theory* (New York: Springer, 1995), the essays in which are very uneven. Some exceptions are Shionoya, “A Methodological Appraisal,” and Hodgson, *How Economics Forgot History*, although the latter interesting work is derivative in its discussion of the German historical school.

<sup>104</sup> Ascher, “Professors as Propagandists,” 290.

<sup>105</sup> Shionoya, “A Methodological Appraisal,” 7, 22ff.

thought, and a close reading of Schmoller's methodological remarks on the subject indicates how he continued to justify claiming the mantle of science for particular "ethical" opinions.<sup>106</sup>

It is indeed true that Schmoller expressed not only the historical relativity of ethical and other values, but even made comments suggesting that individual opinions on matters of values were merely statements of personal *Weltanschauungen*, representing only partial and one-sided viewpoints—a value-subjectivist position.<sup>107</sup> And in the matter of distinguishing practice from theory, he was at least aware that there was a risk of social science degenerating into partisan "agitation" when no separation of the two spheres was allowed.<sup>108</sup> But the way in which he attempted to defang his incipient value subjectivism and its potential effects on the idea of a normative science was to appeal to teleology. He argued that it was unavoidably necessary, at least heuristically, to posit some kind of *telos* for society as a whole in order to understand any given "part" of the social totality, and that in the absence of any sort of "completed" body of knowledge about causal relations in economy and society drawn from empirical studies, the scholar must supply it based on his own perspective.<sup>109</sup> Lest, however, his position be confused with the Weberian ideal type based on the idea of value-relevance, we must add that Schmoller immediately introduced an important caveat to the implication that scholars' teleological

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<sup>106</sup> Although Shionoya's case is plausible, the 1975 attempt made by Born, "Wissenschaft und politisches Werturteil," 111-13, to portray Schmoller as a partisan of Weberian value-freedom is utterly mystifying.

<sup>107</sup> Schmoller, "Über Zweck und Ziele," 5-6, 8; "Die Volkswirtschaft, die Volkswirtschaftslehre und ihre Methode," 237-40, 245.

<sup>108</sup> Ibid., 2; Gerhard Ritzel, "Schmoller Versus Menger: Eine Analyse des Methodenstreits im Hinblick auf den Historismus in der Nationalökonomie," Inaugural Dissertation, Basel, 1950 (see esp. 41, 48) points to Schmoller's career-long inconsistency in the matter of accepting or denying a sphere of "science" apart from "practice," and rightly suggests that though in his actions and sometimes in his thought he clearly showed himself to be against the notion of "pure science" (see, for instance, "Über Zweck und Ziele," 2-5), ultimately it is not possible to clear up theoretically what was simply a discrepancy in his thought. It was likely conditioned by his attempt to distinguish himself and his allies from those with whom he disagreed, who were consequently labeled and dismissed.

<sup>109</sup> Schmoller, "Über Zweck und Ziele," 5-6; "Die Volkswirtschaft, die Volkswirtschaftslehre und ihre Methode," 237-38; see also Born, "Wissenschaft und politisches Werturteil," 111, and Shionoya, "A Methodological Appraisal," 7, 23, which argues that Schmoller treated such teleological judgments in Kantian fashion "as if" society really were a holistic unity or organism aiming at the realization of the ethics of justice through an evolutionary process.

assumptions were purely subjective by arguing that they were already converging on the objective “truth” through the process of cultural evolution.<sup>110</sup> “But,” he wrote, qualifying his seeming value-subjectivism, “a synthesis which comprehends a people, a time, a human life as a whole, which emanates from rich experience, in which consummate expertise [*vollendete Sachkenntnis*] is joined with artistic intuition, can approach so closely to real knowledge that it coincides with it for our purposes. As in all human sciences, so too in economics such a procedure is indispensable and justified.”<sup>111</sup>

Schmoller clung to the idea that scholarship could be normative but still salvage its objectivity through a less one-sided “teleology”: since the different partisan standpoints, generally representing particular material and “ideal” interests such as wealth, class position, freedom or justice, were in fact merely parts of a totality, a truly non-partisan standpoint would be able to reconcile them in the interest of a higher common good.<sup>112</sup> The scholar was, then, much like the Prussian bureaucrats Schmoller so admired, writing and lecturing not in his own interest, but in the “common” interest as a member of a sort of Hegelian “general estate.”<sup>113</sup> It was Schmoller’s conceit that the scholar kept his professional and scientific rigor so long as he did not “agitate,” but there was no reason not to present normative assessments with the authority of science.<sup>114</sup> “Like the chorus in the tragedy of the ancients, it [science] should not itself act,

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<sup>110</sup> Nau, “Gustav Schmoller’s *Historico-Ethical Political Economy*,” 517-18.

<sup>111</sup> Schmoller, “Die Volkswirtschaft, die Volkswirtschaftslehre und ihre Methode,” 240.

<sup>112</sup> Schmoller, “Über Zweck und Ziele,” 8; “Wechselnde Theorien,” 338-40. (The terminology of material and “ideal” interests is Weber’s, not Schmoller’s, but is used for convenience.)

<sup>113</sup> To be clear: so far as I am aware, Schmoller did not directly draw this analogy between the notion of the non-partisan scholar and the bureaucracy as “general estate”—that is, in the language of the old corporate system of estates used by Hegel in his political philosophy, an “estate” of altruistic officials representing the common interest—but because of his strong orientation toward the Prussian bureaucracy both in his political connections and in his historical scholarship, it is a natural way of conceiving how he thought.

<sup>114</sup> The opposition to “agitation” was most obvious in the Verein, where Schmoller long mediated between two major factions, the liberals under Brentano and Knapp, who also preferred to conceive of the Verein as more of a professional scientific body, and the conservative state-socialists like Wagner and Schönberg, who, as Grimmer-Solem puts it, expressed a desire for “direct propagandizing of general principles”; especially after a strong disagreement and close vote over Bismarck’s new parliamentary strategy and introduction of protectionism in 1879,

but rather, separated from the stage, accompany the actors' actions with its considerations, measure them against the standard of the highest ideals of the time."<sup>115</sup> These ideals, he explicitly made clear, were no longer the (formerly) worthy goals of personal and political freedom but rather now involved social reform and increased attention to corporate groups and associations of various kinds under the aegis of the state, since improving the condition of workers was said to be in accord with the "great ideals" and revitalized "ethical" powers of the new era.<sup>116</sup> Thus in vacillating as he did between the open embrace of the old ideal of a moral-political science and the newer positivist ideal of objectivity based on "ascetic" denial of the scholar's tendencies toward bias, Schmoller settled on the notion of objectivity as "non-partisanship."<sup>117</sup> The German professor benefitted from the scholarly independence which allowed him to be free of interests and to devote himself to "nonpartisan" ideals such as justice, and so long as he retained the virtues of his training in "strict, selfless" empirical research on particular problems, his work would be of the highest professional caliber.<sup>118</sup> Conflicting theories could be judged, in effect, on the degree to which scholars were able to surmount partisan interests and approach the ideal of ascetic objectivity: on whether they took more or less of the total available scientific knowledge into consideration to limit partiality, and on whether they rose from the level of particular interests to the "highest general interests," in which "passion, class interest, egotism and position-seeking" were left behind for an "honest conception of the

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Schmoller attempted to gain maximum consensus for proposals appealing to "a broad, multi-partisan audience" and to avoid attempts to "agitate" in order to paper over the differences between these factions. He thereby aimed to protect the existence of the Verein as a unified body. See Grimmer-Solem, *Rise of Historical Economics*, 189-91; Manfred Schön, "Gustav Schmoller and Max Weber," 65. Nonetheless, in a way quite characteristic of Schmoller, while efforts were made after 1879 to avoid the "propagandistic treatment" of topics, the Verein remained focused on economic policy and that the tendency toward normative judgments of its writings did not really change: see Franz Boese, *Geschichte des Vereins für Sozialpolitik* (Berlin: Duncker & Humblot, 1939), 45.

<sup>115</sup> Schmoller, "Über Zweck und Ziele," 9.

<sup>116</sup> Ibid.; "Welchselnde Theorien," 342.

<sup>117</sup> Vom Bruch, "Nationalökonomie zwischen Wissenschaft und öffentlicher Meinung," 328.

<sup>118</sup> Schmoller, "Welchselnde Theorien," 342; "Über Zweck und Ziele," 7.

common good.”<sup>119</sup> This was a notion of objectivity that ignored the theory-dependency of facts and that still allowed the scholar to make normative claims *as a scholar*,<sup>120</sup> the very opposite of the way in which value-freedom advocates would conceive the notion.

Lujo Brentano, Schmoller’s friend and frequent ally—if also the leader of the liberals in the Verein and sometime opponent of Schmoller in various contexts—shared his contemporary’s ascetic ideal but offered a different perspective which served as a sort of transition to that of the value-freedom advocates. In 1896, Brentano published an essay explicitly contesting some of Schmoller’s formulations of the notion of a practically-oriented and normative political economy, although not mentioning Schmoller by name.<sup>121</sup> Beginning with the glaringly apparent fact that economists’ opinions exhibited persistent differences, and that political economy diverged from the natural sciences in its lack of consensus, Brentano acknowledged the difficulties raised by the fact that the economist was inherently “situated” in the midst of the social and economic issues he had to explain. That is, the scholar, as a human being, was involved in associations and identifications arising from national, class, and family relations, individual interests and traditions, which differed widely from person to person and which could introduce room for error and disagreement.<sup>122</sup>

Nonetheless, according to Brentano, the lack of consensus among economists was not really owing to these basic human differences, but instead to a fundamental misunderstanding of the difference between Is and Ought, theory and practice. As he put it, in all other disciplines,

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<sup>119</sup> Ibid., 340.

<sup>120</sup> Schmoller, “Die Volkswirtschaft, die Volkswirtschaftslehre und ihre Methode,” 246; 307-309; “Wechselnde Theorien,” 321-23, 335-36.

<sup>121</sup> Lujo Brentano, “Die Meinungsverschiedenheiten unter den Volkswirtschaftslehrern,” *Cosmopolis* 2:4 (April 1896), 241-60. The essay was later republished with a few introductory remarks as Brentano’s contribution to the *Werturteilsstreit*, as “Über Werturteile in der Volkswirtschaftslehre,” *Archiv für Sozialwissenschaft und Sozialpolitik* 33 (1911), 695-714. Brentano’s introductory comments are noteworthy for their attempt to insinuate that the *Werturteilsstreit* added little to the ideas he had already been raised in his essay; in fact, his own position was closer to Schmoller’s than to the much more sophisticated standpoint represented by Weber.

<sup>122</sup> Ibid., 241-44.

scholars “limit themselves to the interpretation of that which is. They state those facts which fall in their area of knowledge; they present the way these facts have arisen and why they have arisen in such a manner. That is, they see their task solely in the determination of factualities and in the presentation of causal interconnections which bind the facts. It crosses none of their minds to want to teach how things should be. Just for this reason, however, their discipline is real science. If they taught more, then their discipline would no longer be science but *techne* or art. For all science concerns itself with knowing, not with doing.”<sup>123</sup>

To keep pure science separate from practice, Brentano suggested that it must, grammatically speaking, stay within the indicative mode. Social science might, first, offer the political decision-maker information about what *was*, and how and why it was so, and thereby on the origins of contemporary problems, while also using the past as a source of natural experiments with various policies under various conditions. Second, it could teach what *is*, without coloring by party, interest, or wishes, presenting reality conditioned as it is by the whole gamut of possible social, political, and technical factors, as well as outlining the consequences that would follow should any particular policy goal be reached. Third, it could give advice on the way the future is likely *to be*, based not on hopes and wishes but on the likelihood of development according to past and present conditions.<sup>124</sup> Pure science might very well have practical *applications*, as did the natural sciences, but such applications were no task for theorists, and those doing the “applying” must also take variable, situational detail into account.<sup>125</sup>

Scholars’ inability to withstand the sophisms of “agitators,” whether Manchesterite or socialist, who attempted to merge their personal views on how things should be with discussion

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<sup>123</sup> Ibid., 245.

<sup>124</sup> Ibid., 254-55.

<sup>125</sup> Ibid., 254.

of how they are, was at fault for the lack of consensus, and Brentano included Schmoller among those who were to blame. Schmoller's claim that social scientists should take a position on social problems by assessing them (and actions taken to relieve them) on the basis of "the highest ideals of the time," could never provide a stable criterion for judgment. Perhaps if such ideals were really undisputed, they might provide such a criterion, but they *were* disputed—and in practice Schmoller's stance resulted in a "conscious deviation" from the ideal of strict science, an increase in the practice of seeking out evidence to support preexisting opinions, and a tendency to conflate the positive arguments of scholarly opponents with their moral convictions as if the two were identical.<sup>126</sup> The metaphor of the Greek tragic chorus as used by Schmoller, said Brentano, was in fact helpful for making the faults of his position visible, for the ancient chorus had simply represented the perspective of public opinion, and in the modern age public opinion was shaped by the interests of those in different social positions, and shifted rapidly as those interests shifted.<sup>127</sup> Appeals to such a tribunal hardly left the scholar with a certain criterion for judgment.

Despite his introduction of two of the elements of the value-freedom complex into the discussion, however, Brentano's own solution to the problem of objectivity was not deeply considered. To replace Schmoller's notion of social science as a Greek chorus, Brentano suggested an equally philhellenic metaphor: the scholar should be like the wise Tiresias advising Creon in *Antigone*, by being willing to tell the truth regardless of whether it accorded with his own desires or those of political leaders. The challenge, for Brentano, was "not just to the understanding of the researcher, but also to his character": the economist must suppress all feelings and interests—both the self-interested ones and those motivated by his practical or

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<sup>126</sup> Ibid., 246-48.

<sup>127</sup> Ibid., 249-51.

policy orientation—which can lead him astray from objective research, from the search for “holy” truth.<sup>128</sup> Where Schmoller showed in some of his writings at least an incipient recognition of the need to address values and ideals in order to point to *significant* features in history or contemporary society—in his case, a criterion signaling how the many parts of the evolving social “totality” fit together into its ultimate goal or *telos*—Brentano adopted the simple positivist vision best be thought of as value-freedom without Weber’s quotation marks. That is, he really aimed at the minimization or, ideally, total elimination of value commitments by the scholar, hoping that this ascetic practice would allow him to see the unvarnished truth without fear or favor. The objective scholar simply approached his subject matter in a “presuppositionless” state of mind and reproduced what he found, and the test of this objectivity was whether the results of the investigation were free of contamination by the scholar’s own material interests.<sup>129</sup> Brentano had a modest example of such work ready to hand: in his own research on workers’ associations and the conditions of the working class, “I did not come to [my] doctrine by setting out from a belief, from an individual *Weltanschauung*. It corresponds neither with the traditions and personal relationships out of which I came, nor the scientific viewpoint in which I was educated.” His conclusions could hardly be seen as representing a worldview, he asserted, and even if they could, “it is not the starting point but the result of my scientific research.”<sup>130</sup> Since the writings Brentano mentioned here were in fact quite openly normative and filled with policy recommendations regarding trade unions, it is hard to see his position on the theory/practice distinction and the objectivity of economics as anything but contradictory, even within the confines of a single essay.

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<sup>128</sup> Ibid., 259-60.

<sup>129</sup> Ibid., 256.

<sup>130</sup> Ibid., 257-58.



Thus, in summary, we have within the tradition of German historical economics and *Sozialpolitik* scattered pieces of the later value-freedom synthesis coupled with a continued desire for a normative economics that would provide direct and unmediated guidance to the policymaker. The historical economists considered here envisioned political economy as an interpretive social science—one that placed its emphasis on the ways in which individual action was influenced by a multitude of motivations, many of them functions of powerful national, social, and cultural influences, and yet without at all displacing the importance of individual willed action in a determinist manner. Although there were limited tendencies within German historical economics toward the separation of fact and value and toward value subjectivism, it is more accurate to say that the discipline was oriented toward the goal of the older moral-political sciences: discovering the conditions for wise governance of the economy and for human flourishing, conditions which may have been relative to time and place but about which more or less objectively valid claims could supposedly be made within the proper temporal and spatial bounds. Insofar as a new perspective on the appropriate place of values in social scientific analysis made itself felt in the younger figures such as Schmoller and Brentano, it was the nineteenth-century positivist attitude of nonpartisan scholarly asceticism, which was intended to ensure professional objectivity, and which rested quite uneasily amidst their other commitments.

Major difficulties that would confront the value-freedom advocates were simply not addressed by these earlier thinkers. If history and contemporary human actions and institutions were inherently value-laden, and if values could not be proven to be objectively valid, how was the scholar to make choices about what to emphasize and what to pass over in explaining economic life? Brentano had simply ignored this problem, and while Schmoller hinted at an awareness of it, his rejection of economic theory in favor of an ideal of never-ending empirical

description of all aspects of human life relevant to economic activities by its nature discouraged the insight that some form of criterion was necessary for selecting which parts of reality to emphasize. Schmoller's opponent in the *Methodenstreit*, Carl Menger, would insist not only on the separation of theory and practice but on the necessity of such a theoretical criterion, opening the gate for the younger advocate of value-freedom Max Weber to continue on his "theory"-oriented path which we traced in the previous chapter, while advancing a more sophisticated notion of objectivity in the succeeding decades.

## II. Carl Menger and the Beginnings of "Value-Free" Economic Theory

Menger still awaits his biographer, and relatively little is known about his personal views and values. One of three sons of a Galician lawyer, all of whom became well known in Vienna, including the liberal politician Max Menger and the socialist-leaning law professor Anton Menger,<sup>131</sup> Carl (1840-1921) began reading the works of the classical economists in his father's library already in his youth.<sup>132</sup> He studied law at the universities of Vienna and Prague between 1859 and 1863, and worked as a journalist at numerous newspapers at Lemberg (Lviv, Ukraine) and Vienna while serving as a trainee lawyer. He received his doctorate in law at Cracow in 1867.<sup>133</sup> Before his academic appointment, his journalistic activities involved work as a writer and then editor on six different newspapers between 1863 and 1866, and his time as a financial reporter has been noted since Friedrich von Wieser's reminiscence of Menger as having exerted

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<sup>131</sup> On Menger's relation to his brothers, see Kiichiro Yagi, *Austrian and German Economic Thought: From Subjectivism to Social Evolution* (London: Routledge, 2011), Ch.1.

<sup>132</sup> Margarete Boos, *Die Wissenschaftstheorie Carl Mengers* (Vienna: Böhlau, 1986), 7.

<sup>133</sup> *Ibid.*

an influence on his economic views and as probably having introduced a certain level of commitment to realism about the workings of the business world in his economics.<sup>134</sup>

Kiichiro Yagi has documented Menger's journalistic appointments, all of which were at liberal newspapers, including the *Wiener Tagblatt* which he founded and edited during the eventful years of 1865-1866.<sup>135</sup> It was in 1867 that he first began to study economic theory intensively while working at a civil service position, leading to the publication of his first book, *Die Grundsätze der Volkswirtschaftslehre* or *Principles of Economics* in 1871.<sup>136</sup> Shortly thereafter habilitated in the legal and *staatswissenschaftlichen* faculty at the University of Vienna, he had to serve as a *Privatdozent* for only a year before being made associate professor in 1873, and received his chair in political economy there in 1879.<sup>137</sup> Menger would remain at Vienna for the rest of his life, although he published only one more major book, *Untersuchungen über die Methode der Socialwissenschaften und der politischen Oekonomie insbesondere* (1883), or *Investigations into the Method of the Social Sciences*.<sup>138</sup> By his mid-50s, although dignified by various honorary degrees, memberships in international academies, and honorary designation as privy councilor (*Hofrat*), and despite being one of the university's most popular lecturers, Menger withdrew somewhat from university life, preferring to continue extensive research on economics and methodology which he never published and to spend time fishing. He retired

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<sup>134</sup> Friedrich von Wieser, "Karl [sic] Menger," *Neue Österreichische Biographie 1815-1918*, Vol. 1 (Vienna: Amalthea, 1923), 84-92; here 89. Wieser's remarks concentrate on the situation in German-language economics before Menger, and the effect which Menger's major work had on young economics students such as himself and Böhm-Bawerk. There are few personal remarks.

<sup>135</sup> Yagi, *Austrian and German Economic Thought*, 20-22. Menger continued to write journalistically until 1875 even after employment in government and academia.

<sup>136</sup> Carl Menger, *Grundsätze der Volkswirtschaftslehre* (Vienna: Braumüller, 1871); Menger, *Principles of Economics*, trans. James Dingwall and Bert Hoselitz (New York: New York University Press, 1981 [1950]). As elsewhere in this dissertation, I will cite existing English translations following the original German text, but have reserved the right to modify the translations for greater accuracy—and have frequently done so in this chapter.

<sup>137</sup> Yagi, *Austrian and German Economic Thought*, 22; Boos, *Wissenschaftstheorie*, 24-25.

<sup>138</sup> Menger, *Untersuchungen über die Methode der Socialwissenschaften und der politischen Oekonomie insbesondere* (Leipzig: Duncker & Humblot, 1883); Menger, *Investigations into the Method of the Social Sciences with Special Reference to Economics*, ed. Louis Schneider and trans. Francis J. Nock (New York: New York University Press, 1985 [1963]).

officially in 1903.<sup>139</sup> A comment he made in a letter to Georg Jellinek in 1894 seems to capture the spirit of his later years: “I’m working a lot...[but] without the enthusiasm of earlier years.”<sup>140</sup>

Personally, Menger was rather retiring, preferring the posture of an observer and not evincing much interest in socializing—despite obviously possessing certain social skills given his teaching success and an important appointment at the imperial court.<sup>141</sup> Unusually, he never married the woman with whom he lived, though they raised a son, Karl, who would later become a mathematician and head of an important discussion circle in interwar Vienna. Though a nominal Catholic, he appears not to have been a religious man. More is known about Menger’s politics; he could perhaps most readily be described as a right-leaning liberal. The court appointment which he held in 1876 was as tutor to Crown Prince Rudolf, who more than a decade later would dash the hopes of Austrian liberals for a change of course by shooting himself at the Mayerling hunting lodge. Menger was regarded by the officials monitoring the prince’s education as “loyal” and, though a liberal, not a German nationalist, which would at this juncture have been a particular threat to Austro-Hungarian cosmopolitanism.<sup>142</sup> In the series of lectures which he gave Rudolf on economics, Menger treated economic policy, a topic into which he did not enter in his published writings except in matters of monetary policy. According to Erich Streissler, a distinguished historian of Austrian economics who edited and published Rudolf’s notes on Menger’s lectures, they are “probably one of the most extreme statements of *laissez-faire* ever put to paper in the academic literature of economics.”<sup>143</sup> Menger encouraged Rudolf to see the state’s role in the economy as more restricted than the monarchy normally considered it,

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<sup>139</sup> Boos, *Wissenschaftstheorie*, 88-89, 99-

<sup>140</sup> Menger to Jellinek, 22 December 1894, in Nachlass Georg Jellinek, Bundesarchiv Koblenz, NL 1136/17.

<sup>141</sup> For the following, see Boos, *Wissenschaftstheorie*, 100-101.

<sup>142</sup> *Ibid.*, 31; Yagi, *Austrian and German Economic Thought*, 27.

<sup>143</sup> Erich Streissler, “Menger’s Treatment of Economics in the Rudolf Lectures,” in Streissler, ed., *Carl Menger’s Lectures to Crown Prince Rudolf of Austria* (Aldershot, England: Elgar, 1994), 17.

limiting its actions ideally to the prevention of negative externalities, rejecting redistributive agendas, and promoting instead the free pursuit of individual interests in the private market as a sounder strategy for economic growth.<sup>144</sup> Streissler's interpretation relies, however, on reading notes taken by Menger's royal pupil rather than his own published views, and is predicated on the assumption that Menger's later statements of concern over the "social question," support for legislation regulating working hours and factory conditions, and rejection of the "Manchesterite" label were merely defensive. A more balanced viewpoint has been presented by a number of other scholars who conclude uniformly that Menger was a liberal but not an advocate of *laissez-faire*, allowing for pragmatic use of state policy to remedy social problems in some cases.<sup>145</sup>

Aside from his status as the founder of the Austrian tradition in economics which embraced Eugen von Böhm-Bawerk and Friedrich von Wieser among Menger's close colleagues during his own day and subsequently such influential libertarian economists as Ludwig von Mises and Friedrich Hayek, Menger was best known for his role as a methodologist. Although he felt compelled to apologize for his methodological studies and to suggest that the "positive research talent has often enough created a science or changed it in epoch-making fashion without developed methodology" whereas "[m]ethodology without talent has never done this,"<sup>146</sup> Menger nonetheless believed that economics in his era required such studies if it were to avoid taking a mistaken path. As for their importance in philosophical knowledge, he even proclaimed at the end of the 1880s that "[t]he foundation of a methodology of the social sciences is the most

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<sup>144</sup> Ibid., 13-17.

<sup>145</sup> Yukihiro Ikeda, "Carl Menger's Liberalism Revisited," in Harald Hagemann, Tamotsu Nishizawa and Yukihiro Ikeda, eds., *Austrian Economics in Transition* (London: Palgrave Macmillan, 2010), 3-20; Peter Rosner, "Liberal Positions in Carl Menger's Writings," in Gilles Campagnolo, ed., *Carl Menger: Neu erörtert unter Einzbeziehung nachgelassener Texte/Discussed on the Basis of New Findings* (Frankfurt: Peter Lang, 2008); Nau, *Eine Wissenschaft vom Menschen*, 113-114; Yagi, *Austrian and German Economic Thought*, 26-27; Boos, *Wissenschaftstheorie*, 30-32.

<sup>146</sup> Menger, *Untersuchungen*, xii; *Investigations*, 27.

important epistemological task of our time.”<sup>147</sup> This remark followed on a decade of controversy in German-language economics, which had begun with the criticisms of the historical economists that Menger made in the *Untersuchungen* and Schmoller’s subsequent hostile, and personal, review of this book, to which Menger responded with an even more hostile polemic—this exchange constituting the famous *Methodenstreit*.

The headline issue in the *Methodenstreit* was of course the relative importance and proper place of the historical and the “abstract” or theoretical methods in economics, but Schmoller and Menger also overtly disagreed about the separation of theory and practice and about the legitimacy of a normative social science.<sup>148</sup> The latter issues, in other words, did not arise for the first time in Central European economics during the value judgment dispute of the

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<sup>147</sup> Menger, “Grundzüge einer Klassifikation der Wirtschaftswissenschaften,” offprint of *Jahrbücher für Nationalökonomie und Statistik*, New Series Vol. 19 (Jena: Fischer, 1889), reprinted in *The Collected Works of Carl Menger* (London: London School of Economics and Political Science, 1933-1936), Vol. III, 187-218, here 211; translated as “Towards a Systematic Classification of the Economic Sciences,” in Louise Sommer, ed., *Essays in European Economic Thought* (New York: Van Nostrand, 1960), 1-38, here 27. Sommer’s translation, while generally preserving the meaning accurately, is relatively loose, and I have often altered it in this chapter to conform more closely to the original.

<sup>148</sup> Strangely, the issue of normativity has been almost entirely neglected in the secondary literature. The received view of the controversy, as one scholar accurately describes it, has been “in terms of an inductive, realistic, empirical, historical, holistic and ethical approach held by Schmoller vs. a deductive, abstract, theoretical, aprioristic and individualistic approach espoused by Menger”: Uskali Mäki, “Universals and the *Methodenstreit*: A Re-Examination of Carl Menger’s Conception of Economics as an Exact Science,” *Studies in History and Philosophy of Science* 28:3 (1997), 475-495, here 476. Mäki rightly qualifies this view, and we will examine some of the reasons why it is inaccurate in section b) below, but the significant thing to note here is that there is no parallelism between the last term describing Schmoller’s method (“ethical”) and the description of Menger’s method, an oversight fully in keeping with the preoccupations of the literature. The few treatments of value-freedom in Austrian economics tend to mention that Menger initiated the tradition, but without any further explanation, preferring to concentrate on the later (and Weber-influenced) views of Ludwig von Mises and subsequent economists. See, e.g., Israel Kirzner, “Value Freedom,” in Peter J. Boettke, ed., *The Elgar Companion to Austrian Economics* (Cheltenham: Elgar, 1994), 313-319, where Menger merits a sentence noting his priority over Max Weber but without discussing what he meant by value-freedom at all: 314; Sandye Gloria-Palermo and Giulio Palermo, “Austrian Economics and Value Judgments: A Critical Comparison with Neoclassical Economics,” *Review of Political Economy* 17:1 (2005), 63-78, where Menger is entirely ignored and the doctrine is said to arise from the work of Hume and Weber (p.66); Herbert Pribyl, ed., *Wirtschaft und Ethik: Die Oesterreichische Schule der Nationalökonomie und die Wiener Schule der Naturrethetik* (Heiligenkreuz: Be&Be, 2009), treats the topic of value-freedom only very superficially and only with reference to later Austrian and “Austrian” figures. Margarete Boos and H.H. Nau have each devoted several paragraphs to Menger’s ideas on value-freedom, and we will make reference to their brief comments in section b).

early twentieth century, nor even in the mid-1890s.<sup>149</sup> Indeed the two sets of issues were at least partially connected in the *Methodenstreit*. As we have seen, Schmoller believed that historical and statistical studies of economic and social problems directly generated the normative conclusions he preferred, while “abstract” economic theory would invariably generate opposing normative conclusions. Menger in turn argued that Schmoller and his predecessors had confused several analytically separable tasks and made clear that, in and of themselves, neither historical nor theoretical methods would require particular policies in the absence of externally set policy goals.

The fact that the problems of “practice” and normative social science were discussed is perhaps what has led to the occasional interpretation of this methodological controversy as a political controversy. It is therefore important to observe that the dispute between Schmoller and Menger over both “theory and history” and “theory and practice” was *not* a dispute about politics or policy. In the course of his scholarly history of the group of economists around Schmoller, Erik Grimmer-Solem has claimed that the *Methodenstreit* was “a debate about the admissibility of social reform and other activist economic policy” and not primarily a methodological argument, and he provides a salutary reminder that methodology can sometimes be used for political purposes.<sup>150</sup> However, in suggesting that the “only thing that could justify” Menger’s critical references to a large number of German economists “was not method but a common

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<sup>149</sup> Rita Aldenhoff’s important essay, noted in Chapter 1 above, rightly argues that some of the issues involved in the *Werturteilsstreit* had arisen in two short works by Weber and Sombart in 1895-97; but she also suggests that the methodological interests of the *Methodenstreit* had by the 1890s been displaced by concerns about the public role of economics and its ability to recognize and offer suggestions for improving social problems: Aldenhoff, “Nationalökonomie und Kulturwerte um 1900,” in Rüdiger vom Bruch, et al., eds., *Kultur und Kulturwissenschaften um 1900* (Stuttgart: Steiner, 1989), 49. That the latter topic—the notion of a practical social science—was also a methodological issue, in the broad sense of the term “methodology” in Germany in this era, and that it was certainly one of the issues involved in the *Methodenstreit*, is suggested by the present chapter.

<sup>150</sup> Grimmer-Solem, *Rise of Historical Economics*, 246.

involvement in social reform,”<sup>151</sup> he reduces Menger’s decades of work in the theory of social science to a covert political gesture. If indeed Menger’s opposition was to the Schmoller school’s social reform policies rather than to the claims for a historical method in economic theory by economists from Roscher onward, it would have been rather strange for Menger to devote so much of his academic life to the complex methodological inquiries we will examine below rather than to open arguments about economic policy. Moreover, though he was certainly more of a liberal than a *Kathedersozialist*, Menger never offered explicit opposition to social reform anywhere in his published work<sup>152</sup> and even made occasional comments supporting it, such as the remark to Rudolf in favor of factory legislation that “the state is nonetheless obliged to intervene in their [factory owners’] economic activities in such cases [of overworking labor] and rather to prevent additional profits from accruing to those factory owners, if this is in the greater, general interest of the state” or to protect children by “intervening strongly” on their behalf when overworked.<sup>153</sup> Menger of course counted among his colleagues and allies several Austrian economists who shared both his *methodological* position on economic theory and also *Schmollerite politics*, such as Wieser and Eugen Philippovich. The former wrote of Menger praising his lack of “party-interest” in his scientific work and his avoidance of (political)

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<sup>151</sup> Ibid., 253. This judgment also entails accepting Grimmer-Solem’s criteria for considering which economists to count as “historical” in their methods, which we noted above were even more stringent than Heath Pearson’s, thereby probably excluding many economists whom Menger would in good faith have considered “historically” oriented.

<sup>152</sup> As opposed to *socialism*, which Menger did view with some scorn, e.g. in a passage cited by Grimmer-Solem (*Untersuchungen*, 84-85; *Investigations*, 92), but which can hardly be treated as counting against Menger in this matter since a major part of Schmoller’s own intention was to use social reform as a means to weaken the socialist movement.

<sup>153</sup> Streissler, ed., *Lectures to Crown Prince Rudolf*, 128-129. Note also his praise for Adolf Wagner, specifically on the basis of the latter’s concern for “the welfare of the destitute classes”; Wagner was politically aligned with Schmoller, although even further towards conservative state-socialism, *but he was a theorist* and took Menger’s side in the *Methodenstreit*. Menger, “Zur Kritik der politischen Oekonomie,” *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* 14 (1887), reprinted in *The Collected Works of Carl Menger*, Vol. III, 99-131, here 112.



passions, an assessment which carries some weight owing to Wieser's conservative welfare-statist politics.<sup>154</sup>

In order to support the notion that Menger undertook his extensive methodological investigations out of political differences over social reform with the conservative Schmoller, who was in fact rarely mentioned in the *Untersuchungen*, Grimmer-Solem emphasizes the fact that Menger did not address the economic role of the state in the *Grundsätze*, but he neglects to mention that the work was intended as the first part of a series of books on the entire discipline of economics, including state policy.<sup>155</sup> He argues that Menger was a devotee of the French Revolutionary era conservative writers Edmund Burke and Friedrich Carl von Savigny because Menger recognized explanatory value in their descriptions of unintended “organic” developments, but he does not mention that Menger went on to criticize these same thinkers in the same passages for their “one-sidedness and shortcomings,” especially in assuming that whatever has come to be must be defended or that “the wisdom in organically created social structures is *a priori* and without proof higher than human wisdom, i.e. higher than the judgment of the present.”<sup>156</sup> This was Menger the tutor to the liberal crown prince, who wrote that after his death “I lost a serious interest in life. He could have become a great ruler...” —not an organicist opponent of the Enlightenment and liberalism.<sup>157</sup> Again, none of this is to argue that Menger was

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<sup>154</sup> Wieser, “Karl Menger,” 91.

<sup>155</sup> Nau, *Eine “Wissenschaft vom Menschen,”* 112,n.49. The subtitle of the original edition of the *Grundsätze*, “Erster, Allgemeiner Teil” (“First, General Part”) by itself suggests fairly clearly that Menger did not see it as a complete treatment of the subject matter of economics.

<sup>156</sup> Menger, *Untersuchungen*, 208, 214; see also Book IV, Ch.2; *Investigations*, 177, 181-182; in a footnote to the “Grundzüge,” 213n.1, Menger observes that Brentano fails to see the difference between “inquiry into the nature of economic phenomena” and “justifying and sanctioning the existing economic order,” which is no part of his purpose. (English: “Systematic Classification,” 37-38n.25.)

<sup>157</sup> Quoted in Yagi, *Austrian and German Economic Thought*, 29. In identifying Menger with the organicists (*Rise of Historical Economics*, 255-57), Grimmer-Solem rightly points out that Menger was skeptical of what can be called the “rationalistic” perspective within the Enlightenment which saw consciously designed legislative changes as being the solution to social problems, but this hardly is an indication of opposition to the kind of Scottish Enlightenment thought that Menger found appealing (granting that he misinterpreted Adam Smith as belonging too

a “*Sozialpolitiker*” or that he and Schmoller agreed on the best way to deal with poverty, but only that the political differences were not nearly as interesting to the pure theorist in Vienna as they were to the academic politician in Berlin.

It is in fact even mistaken to present Menger as an opponent of historical-statistical economics *tout simple*, rather than as an opponent of the idea that economics can *only* be historical. The passages in which he pointed out the virtues of historical awareness in the *Untersuchungen* are too numerous to bother cataloguing,<sup>158</sup> and he even called, unprovoked, for greater historical research in its appropriate place.<sup>159</sup> But what *was* the proper task of historical method according to Menger, and what exactly did he offer in its place when he advanced his own theory? What elements of the value-freedom complex did he accept and on what grounds? As a subjectivist, in a manner specified below, how did he hope to secure the scientific objectivity of economics? Although this section will address most of the issues involved in the *Methodenstreit* in the course of considering these questions, it should not be seen as an account or assessment of this well-known dispute.<sup>160</sup> The guiding thread is instead Menger’s creation of a

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simply to the former category). Alongside excessive historicism, organicist theories are, after all, one of the main targets of *opposition* from a methodological perspective in Menger’s *Untersuchungen*.

<sup>158</sup> Menger clearly stated that it was “the poorly cloaked contempt for and basic negation of all other orientations of research” that was the real problem, not the usefulness of the historical approach for its particular tasks:

*Untersuchungen*, xix; *Investigations*, 31.

<sup>159</sup> See, for instance, Menger’s long, methodologically-oriented review of Schönberg’s *Handbuch der politischen Oekonomie* in “Zur Kritik der politischen Oekonomie,” where he suggests that Schönberg use more source-criticism-based historical research (106), and praises the statistician Wilhelm Lexis’s non-theoretical account of business activity (113).

<sup>160</sup> Other assessments of varying quality are available: Ritzel, “Schmoller Versus Menger”; Samuel Bostaph, “The Methodological Debate Between Carl Menger and the German Historicists,” *Atlantic Economic Journal* 6:3 (Sept., 1978), 3-16, which remains the standard interpretation of the philosophical positions of the two sides; Gary Anderson, Robert Ekelund and Robert Tollison, “*Methodenstreit*: The Economics of Competing Interests,” *European Journal of Political Economy* 8 (1992), 401-418, which interprets the debate as shaped by a concern over the ability for new ideas to penetrate a “market for ideas” with high barriers to entry; Jürgen Backhaus and Reginald Hansen, “*Methodenstreit* in der Nationalökonomie,” *Journal for General Philosophy of Science* 31 (2000), 307-336, which is highly sympathetic to Schmoller and makes claims which cannot be sustained, such as that Schmoller was really an “outsider” not accepted in the Verein für Sozialpolitik, and that his opponents in the *Methodenstreit* and *Werturteilsstreit* criticized him for his value-relativism: 313; and recently Marek Louzek, “The Battle of Methods in Economics: The Classical *Methodenstreit*—Menger vs. Schmoller,” *American Journal of Economics and Sociology* 70:2 (2011), which unfortunately manages to be simultaneously derivative, superficial, and unreliable.

theory-driven, “value-free” economics which took subjective mental states and values, and actions based upon them, as its core data. We begin with Menger’s conception of the tasks of economics and then proceed to his ideas on value-freedom and an assessment of the problem of objective knowledge in his thought.

### **a) Menger’s “Interpretive Social Science” of Economics**

Since Menger has long been viewed as the principal opponent of German historical economics, and, with W. Stanley Jevons and Léon Walras, as one of the initiators of the “Marginal Revolution” that marked the birth of scientific neoclassical economics, it may initially seem unusual to suggest that Menger’s work has anything whatsoever in common with interpretive social science.<sup>161</sup> After all, historicism has always been closely associated with hermeneutic methods, while neoclassicism has been notorious for its adoption of analogies and modes of thinking from mechanics and thermodynamics, and for its reduction of the economizing individual to a black box with a utility function to maximize.<sup>162</sup> But in fact Menger was not as far from the older historical economists nor as close to Jevons and Walras as this now outdated portrayal would seem to suggest. Much of the best work on Menger over the years has helped to lay to rest many misconceptions about his relation to nineteenth-century German economics and to Walrasian neoclassicism.<sup>163</sup> This holds equally for the particulars of his

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<sup>161</sup> He has appeared as such in prominent textbooks on the history of economics, such as Eric Roll, *A History of Economic Thought*, 5<sup>th</sup> ed. (London: Faber and Faber, 1992), 352-57; Robert Lekachman, *A History of Economic Ideas* (New York: McGraw Hill, 1976), Ch.10. Even Schumpeter, *History of Economic Analysis* (London: Allen & Unwin, 1954), 918, who was aware of the Austrian peculiarities and sensitive to the need for a broader social science, suggested the view of Menger (and Jevons) as incomplete Walrasians. More recent textbooks, e.g. Roger Backhouse, *The Ordinary Business of Life: A History of Economics from the Ancient World to the Twenty-First Century* (Princeton: Princeton University Press, 2002), 173-177, more commonly recognize the differences between Menger on the one hand and Walras and Jevons on the other by considering his contributions separately as part of a distinct Austrian tradition within the larger German economic tradition.

<sup>162</sup> The classic, if somewhat exaggerated, critical history of neoclassical economics’ “physics envy” is Philip Mirowski, *More Heat Than Light: Economics as Social Physics, Physics as Nature’s Economics* (Cambridge: Cambridge University Press, 1989).

<sup>163</sup> Streissler, “The Influence of German Economics on the Work of Menger and Marshall,” and William Jaffé, “Menger, Jevons and Walras De-Homogenized,” *Economic Inquiry* 14 (Dec. 1976) initiated these

economics, especially in value theory, and for his methodology. Re-locating Menger's work in its original intellectual context allows us to appreciate its commonalities with the emerging German "interpretive social science" tradition of non-determinist, meaningful-action-oriented scholarship on economic life, which this chapter argues is a key prerequisite for the mature "value-free" science ideal. Because there were also significant differences between Menger and the Germans, lying mainly in the former's Aristotelian realism and the latter's historicism and neo-Kantianism, these commonalities are best appreciated through a contrast with the mode of economic analysis represented by Menger's contemporary, Walras.

The French father of general equilibrium economics aimed, like Menger, at a unified explanation of all prices in a competitive exchange economy, in which explaining factor prices<sup>164</sup> constituted merely one part of the task, and in which marginal analysis played an important role in assessing price formation.<sup>165</sup> Walras' version of marginal utility, the notion of *rareté*, a measure of the intensity of the individual consumer's last want satisfied under conditions of scarcity, served as the criterion by which individual market actors would allocate their resources

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reconceptualizations, respectively. It has long been recognized that Menger, and the Austrian tradition he initiated, differed from neoclassicism in their rejection of mathematics in economic analysis, although this was in no way unusual in the discipline until the 1930s.

<sup>164</sup> That is, the prices of the factors of production, traditionally rendered as the services of land, labor, and capital, ignoring for the time being entrepreneurial ability. In the British classical approach from Malthus and Ricardo through Mill, questions of distribution to these factors in the form of rent, wages, and interest (the price of using them) had formed the center of attention, and the analysis of supply and demand in both agricultural and manufactured products was bound up with the scarcity of usable agricultural land (raising rents with growth) and the equilibrating tendencies of the Malthusian law of population (leveling wages with growth). Economic analysis in this form necessarily concentrated on aggregate supply and demand and on the question of long-term growth (or lack thereof, as residual profits, capital formation, and investment were purported to decline with rising rents), rather than on individual consumption decisions or acts of exchange, and marginal analysis was employed only in the case of differential rents. For Walras and Menger in their different ways, the prices of factors of production could best be assessed by viewing them as goods like any others within the same exchange framework, although a full-fledged marginal theory of distribution awaited proper elaboration in the 1890s with John Bates Clark and others.

<sup>165</sup> The inevitably highly simplified survey of Walras' economics and its assumptions made in the following three paragraphs derives from Donald Walker, *Walras's Market Models* (Cambridge: Cambridge University Press, 1996), esp. 21-23; Donald Walker, *Walrasian Economics* (Cambridge: Cambridge University Press, 2006), 63-84, 102-108, 128-139, 162-166; Donald Walker, ed., *William Jaffé's Essays on Walras* (Cambridge: Cambridge University Press, 1983), 87-88, 291-305; Mary S. Morgan, "Economics," in Theodore Porter and Dorothy Ross, eds., *The Cambridge History of Science*, Vol. 7, *The Modern Social Sciences* (Cambridge: Cambridge University Press, 2008), 275-305; Roger Backhouse, *Ordinary Business of Life*, 170-72.

and thus explained the relationship between individual utility and demand. Like various other marginal utility theorists throughout the nineteenth century, Walras recognized both that marginal utility diminished with increasing quantities of a good, and that the economic agent would be able to maximize utility if he or she allocated all available resources such that the ratio of the marginal utility of each good to its price was equal across all goods consumed.<sup>166</sup> This approach allowed Walras to provide a strict logical rationale for the empirical observation that curves constructed to represent demand schedules for a good at different prices were downward-sloping, as his predecessor Cournot had argued. It also allowed him, like Jevons, to introduce greater precision into the language of economics through the differential calculus, which could be used not only in the analysis of utility maximization—in which marginal utility could be defined rigorously as the first derivative of total utility with respect to quantity—but subsequently for any use of the marginal principle, whether in the assessment of revenue and costs on the supply side, in the marginal productivity theory of distribution, or elsewhere.

Unlike both Menger and Jevons, Walras placed much less emphasis on using marginal utility analysis to explain demand and price formation in cases of bilateral exchange,<sup>167</sup> nor was he especially interested in the process of offering prices in negotiations between parties as in Menger's bartering examples. Instead, his economic agents were price takers: in any given product or factor market they were simply faced with market prices, declared as if by an auctioneer; corresponding to the declared price, each individual or firm would demand a set

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<sup>166</sup> These propositions are, of course, known as the "law" of diminishing marginal utility and the equimarginal principle, sometimes known as Gossen's First and Second Laws after yet another mid-nineteenth-century German theoretician, the initially ignored Heinrich Gossen. The latter principle holds because if the ratios were not exactly equal, the consumer could gain a welfare advantage by reallocating resources to the good whose marginal utility divided by price was higher than that of alternative goods.

<sup>167</sup> Both of the former concentrated on such exchanges rather than on perfectly competitive markets with an indefinite number of sellers, although it should be noted that neither completed a full presentation of their price theory, as their main works (Jevons' *Theory of Political Economy* and Menger's *Grundsätze*) were regarded as introductory.

quantity of the good in accordance with marginal utility or marginal cost considerations. But, pivotally, not a single transaction would occur, even if it was welfare-improving, except at the market clearing price—at the point of equilibrium. And the truly characteristic feature of Walras' economics, with which he was preoccupied long before his use of marginal utility, and which provided him with much greater recognition in the twentieth century than it did during his lifetime, was his attempt to explain *multi-market* or general equilibrium. Here again following Cournot, Walras rightly pointed out that individual product markets could not really be totally isolated from one another but were necessarily interconnected and influenced each other in ways that could not be accounted for by partial-equilibrium analysis. Attempting to discover the market-clearing prices and quantities for a momentary cross-section of the entire economy as an integrated whole was, obviously, an impossible task, but Walras argued that under certain specified assumptions, it was possible to show that the number of equations modeling the different product and factor markets were equal to the number of unknowns (prices and quantities). Such an outcome would, he believed, demonstrate the existence of an equilibrium position for the economy to which it would ineluctably return if prices in any part of it temporarily deviated. At a slightly lower level of formality, he tried to provide a “quasi-dynamic”<sup>168</sup> explanation for the process of equilibration: the economy itself could be said to approach such an equilibrium position by the process of *tâtonnement*: starting from an arbitrary auctioneer's price, competitive markets would “grope” their way to the equilibrium state through the logic of maximization under scarcity.

Our interest here is not so much in the details of Walras' achievement, which can only be sketched rather grossly, but in the set of assumptions it necessarily made about human action and the appropriate methods for the social science of economics, and in the alternative position

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<sup>168</sup> Walker, ed., *Jaffé's Essays on Walras*, 131.

adopted by Menger. In order to attain the high level of precision and sophistication he reached in explaining how markets could generate a stable, optimum equilibrium state—a precision surpassed only the better part of a century later by Kenneth Arrow and Gérard Debreu in the 1950s<sup>169</sup>—Walras had to discuss a very stylized economy indeed.<sup>170</sup> The individual economic agent described by his mathematics was equipped with complete knowledge of every part of the economy: every market, every other agent’s wants (or preferences, in the preferred modern language), and exactly what would happen throughout the system at any set of prices and quantities. The agent was completely rational and incapable of making errors of information or judgment, and always selected the best means to every end; his sole motive was to maximize a quantity of some implicitly substantial units of satisfaction; the quantities of satisfaction and the goods consumed were not discrete (or “lumpy”) but completely divisible in order to make the use of calculus rather than simple linear equations possible. The ends which the agent pursued in the course of maximizing his satisfaction were determined for him at the outset and unalterable, not subject to deliberation. In fact, even describing the individual as an agent is mistaken, for he did not ever make a choice of any sort: when confronted with the stimulus of a given price, action (or inaction) was instantaneous in accordance with the utility function describing the individual’s preferences at that price. The environment in which these automata existed was composed of such a large (indeed, technically, it ought to have been infinite) number of buyers and sellers of identical commodities that no one person or firm could exert market power of any sort; the prices they all faced were announced to them by some external mechanism (the

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<sup>169</sup> Who advanced beyond Walras’ method of counting equations and unknowns (minus the *numeraire*, the good in terms of which others were measured or, generally, money), which did not offer a rigorous proof and which allowed the possibility of negative roots, physically impossible given that the solutions were intended to represent real prices and quantities, alongside other problems. On modern general equilibrium theory, see Bruna Ingrao and Giorgio Israel, *The Invisible Hand: Economic Equilibrium in the History of Science* (Cambridge: MIT Press, 1990).

<sup>170</sup> It was not, thereby, a fictional or hypothetical model in his view, but an abstraction directly from reality and related to it as a fairly good approximation in Walras’ opinion: Walker, *Walrasian Economics*, 66.

auctioneer); time and space did not exist in any substantive sense, since market-clearing was instantaneous and frictionless at the correct set of prices, and consequently there was no period of production, no uncertainty about future states, no transaction costs. Equilibrium was a static state, to be compared with alternate static states, and naturally technological change, growth, and other such dynamic factors had no endogenous place in a system of comparative statics.

Menger's approach to economics hardly dispensed with simplifying assumptions, nor could it. Nonetheless, his view of the economic agent, and the processes of interaction and competition between agents that made up the economy, was strikingly different and considerably closer to what would become the "interpretive social science" approach in Germany. The individual in Menger's economics was not characterized by perfect knowledge, complete rationality and complete freedom of action, inerrancy, or a utilitarian (let alone hedonist) set of motives.<sup>171</sup> As he would later put it, "it may be admitted ever so unreservedly that people are governed in economic things neither exclusively by a single definite propensity, in our case by their egoism, nor are uninfluenced by error, ignorance, and external compulsion."<sup>172</sup> The *Grundsätze* was filled with remarks on the existence of error and the lack of information, and the way in which economic agents worked to minimize but never to eliminate such influences on their conduct. For instance, he wrote, "If...men were always correctly and completely informed, as a result of previous experience, about the concrete needs they will have, and about the intensity with which these needs will be experienced during the time period for which they plan,

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<sup>171</sup> Several scholars have discussed these characteristic features of the Austrian approach to economics in the form initially given it by Menger; although my treatment of these characteristic themes in Menger is based on the original texts, I have also found particularly useful: Sandye Gloria-Palermo, *The Evolution of Austrian Economics: From Menger to Lachmann* (London: Routledge, 1999), 18-36; A.M. Endres, *Neoclassical Microeconomic Theory: The Founding Austrian Version* (London: Routledge, 1997), 9-40, 60-84, 108-125; Allen Oakley, *The Foundations of Austrian Economics from Menger to Mises* (Cheltenham: Elgar, 1997), 56-70. Eugen Maria Schulak and Herbert Unterköfler, *Die Wiener Schule der Nationalökonomie: Eine Geschichte ihrer Ideen, Vertreter und Institutionen* (Weitra: Bibliothek der Provinz, 2010), is recent but unfortunately superficial, particularly on Menger: 48-52.

<sup>172</sup> Menger, *Untersuchungen*, 46; *Investigations*, 64.



they could never be in doubt about the quantities of goods necessary for the satisfaction of their needs... But experience tells us that we are often more or less in doubt whether needs will be felt in the future at all,” or if so, in what intensity.<sup>173</sup> The level of rationality in the determination of the appropriate types and stocks of goods to meet needs and wants varied with the level of civilization, as Menger suggested on several occasions, and it was certainly possible for agents to be mistaken, even about the assessment of “the relative degrees of importance of different satisfactions and of successive acts of satisfaction” of their own needs and wants.<sup>174</sup> Human beings strove for knowledge to reduce such errors, and to reach exactitude where possible, but he suggested that in reality they were generally content with what would later be known as “satisficing” behavior. In assessing the means (in the form of the appropriate goods) towards their ends, instead of the “ideal result” of a “complete enumeration” and “exact determination” of these goods, “In practical life...far from pursuing this ideal, men customarily do not even attempt to obtain results as fully exact as it is possible in the existing state of the arts of measuring and taking inventory, but are satisfied with just the degree of exactness that is necessary for practical purposes.”<sup>175</sup>

Further differentiating him from Walras, Menger did not regard the use of calculus as a step forward in economic analysis precisely because it could not hope to take the subjective meanings of individual actions into account as part of the process of scientific explanation in economics. Menger’s important letter to Walras of February 1884 has often been cited as evidence of his Aristotelian realism or essentialism on the basis of the comment that “[w]e

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<sup>173</sup> Menger, *Grundsätze*, 36; *Principles*, 81.

<sup>174</sup> *Ibid.*, 4, 25, 28-29, 32-33, 250-51; *Principles*, 53, 70, 74, 78-79, 257; quotation: *Grundsätze*, 121; *Principles*, 147.

<sup>175</sup> *Ibid.*, 46; *Principles*, 90 (businesspeople might well strive for a higher degree of exactness here, he observed). Menger frequently made comparable statements about adequacy for practical purposes: see, e.g., *Grundsätze*, 39; *Principles*, 84.

investigate however not only the relationships of quantities but also the ESSENCE of economic phenomena.”<sup>176</sup> But what has been neglected is the decisive way in which Menger embraced interpretive social science. Describing his “analytic-compositive” method, which we will discuss briefly at the end of the following section, he emphasized that mathematics could help greatly in measuring quantities but never in determining the basic elements out of which lawfulness arises in the social world. Clarifying with the example of price theory, he observed that the phenomenon of exchange could not be explained without going back “to the needs and wants (*Bedürfnisse*) of human beings, the meaning which the satisfaction of these wants has for the latter, to the quantities of individual goods which are found in the possession of individual economizing subjects, to the subjective meaning (to the subjective value) which concrete quantities of goods have for the individual economizing subject, etc.,” none of which were accessible to mathematics.<sup>177</sup>

The absence of calculus in Menger meant, incidentally, that he was not burdened by the impulse to posit a single substance (utility or its equivalent) for the agent to maximize, nor by the need to model goods as infinitely divisible.<sup>178</sup> Instead, the economizing individual in Menger’s *Grundsätze* pursued the goal of satisfying his discrete wants as best he was able; he made conscious *choices* about which course of action to take, and took those actions which in light of his information and understanding seemed likeliest to satisfy the largest number of wants as

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<sup>176</sup> William Jaffé, ed., *Correspondence of Léon Walras and Related Papers*, vol. 2 (Amsterdam: North-Holland Publishing, 1965), Letter 602 (from Carl Menger), 3.

<sup>177</sup> Ibid., 4. In notes made in his “author’s copy” of the *Grundsätze* during the 1870s, Menger had cited a certain Eduard Pfeiffer’s book on state revenues as an impetus for the reflection that mathematical certainty was not available in the case of human beings because of their status as “living organisms” bringing “partly incalculable” actions along with them. Menger’s “author’s copy” has been located at Hitotsubashi University in Tokyo since the 1920s and his marginal comments were published in mimeograph by Emil Kauder in 1961 as *Carl Mengers Zusätze zu ‘Grundsätze der Volkswirtschaftslehre’* (Tokyo: Library of Hitotsubashi University, 1961): here, p. 17.

<sup>178</sup> In the *Grundsätze*, the quantities are always of “lumpy,” indivisible goods such as horses.

completely as possible.<sup>179</sup> Such an approach also encouraged Menger to advance an ordinal approach to “utility”—in which individuals chose among different goods to satisfy different wants without any implication that there was a common unit of measure shared between them to make cardinal comparisons possible.<sup>180</sup> Menger’s marginalism was on display in explaining how economizing individuals facing scarce goods and wants of different degrees would allocate their resources. But it was not the mathematically defined marginalism of Walras. In the determination of prices, for example, different marginal values set on a unit of goods by two traders would indeed set the bounds between which a price might be agreed upon, but the price itself was not determinate and the real price ultimately agreed would depend upon such factors as the bargainers’ “various individualities and upon their greater or smaller knowledge of business life and, in each case, of the situation of the other bargainer.”<sup>181</sup> In short, individual economic agents were not walking demand schedules but *agents*: they were active and purposive, not passive calculating machines automatically responding to stimuli, and their actions were not foregone conclusions. Essentially for our argument, then, their subjective mental states, intentions and contingent decision-making, even in conditions where a high degree of rationality was presumed as a baseline, were at the center of economics. “[M]an, with his wants and his

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<sup>179</sup> Menger, *Grundsätze*, 51-52; *Principles*, 94-95; see also Menger’s account of the traits necessary for defining a good as the foundation for his considering the satisfaction of needs as the basic activity of economic agents, rather than the maximization of a quantity of utility: *Grundsätze*, 3; *Principles*, 52.

<sup>180</sup> See Pierre Livet, “Cardinality or Ordinality in Menger’s Framework,” in Gilles Campagnolo, ed., *Carl Menger: Neu erörtert unter Einzbeziehung nachgelassener Texte/Discussed on the Basis of New Findings* (Frankfurt: Peter Lang, 2008), which provides a persuasive answer to the question of whether Menger held an “ordinalist” view: a qualified yes. This was incidentally more in line with subsequent developments in economics which have generally left utility behind in favor of indifference curves. For the qualification, see *Grundsätze*, Ch.3, Section 2.A, which presents Menger’s famous numeric table of goods showing the effects of diminishing marginal utility; although Menger frames the discussion in such a way that it is unnecessary to assume one can compare the different goods in terms of a common measure (as opposed to merely ranking them based on the agent’s revealed preference), he nevertheless vaguely suggests such a comparison.

<sup>181</sup> Menger, *Grundsätze*, 177; *Principles*, 195; see also the discussion of price at the end of Book I, Ch.5 of the *Untersuchungen/Investigations*.

command of the means to satisfy them, is himself the point at which human economic life both begins and ends.”<sup>182</sup>

At the level of the market, moreover, Menger’s notion of competition was a far cry from Walras’ equilibrium analysis. There was no auctioneer offering a market price to be taken or left, and Menger’s economizing individuals and firms did not make their decisions within a static *state* of perfect competition, but rather as part of a *process* of competition. His analysis of prices is staged as a set of “duels” between bargaining parties which allow a step-by-step approximation to an agreeable price, beginning with a monopoly situation and introducing larger numbers of parties without ever reaching the *state* of perfect competition. Transactions did not need to “wait” for a market-clearing price, and still less for multimarket equilibrium, for movement to occur.<sup>183</sup>

Although the major purpose of the *Grundsätze* was precisely to delineate the setting of values and prices through exchange in markets of varying degrees of competitiveness, Menger did not ignore other aspects of the economy seemingly more distant from exchange.<sup>184</sup> Indeed, like Walras, he shared the aim of presenting a unified theory of value and prices which would bring not just exchange but production and income distribution under a single perspective and dispense with the rather ad hoc explanations characteristic of pre-marginalist economics.<sup>185</sup> He approached integrating production with consumer decisions and exchange by arguing that goods should be seen as belonging to different “orders.”<sup>186</sup> Those goods which were directly suited to personal consumption (say, a loaf of bread) he labeled goods of the first order, while those which

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<sup>182</sup> Ibid., 69; *Principles*, 108.

<sup>183</sup> Ibid., Ch. V; see Gloria-Palermo, *Evolution of Austrian Economics*, 27-33, and Endres, *Neoclassical Microeconomic Theory*, Ch.7, for good summaries.

<sup>184</sup> On the ways in which issues of information, rationality, time and uncertainty played in to production decisions, see especially Oakley, 62-70, 85-86.

<sup>185</sup> Menger, *Grundsätze*, x; *Principles*, 49.

<sup>186</sup> For Menger’s ongoing discussions of first-order, second-order, X-order goods, see *ibid.*, 7-10, 67-68, 123ff.; *Principles*, 55-58, 107, 149ff.

were necessary to produce first order goods (say, flour, yeast, and an oven) belonged to the second order, while in turn they required goods of still higher orders (e.g., harvested grain, pig iron), and so forth.<sup>187</sup> The values of production goods and services, including returns to land, labor, and capital, could be imputed to them on the basis of their subsequent contributions, in complementary combination, to those first-order goods which were directly valued by consumers.<sup>188</sup>

While the first and only volume of the *Grundsätze* did not cover the theory behind production or income distribution in great detail, it is possible to see how Menger's approach would differ from that of Walrasian neoclassicism. Most importantly, business firms too were characterized by the absence of perfect knowledge and rationality, and by the possibility of error, as they attempted to provide the right quantity of goods at the right times to maximize profits. Business decisions and production itself took place in time rather than instantaneously, which meant that there were unavoidable risks in trying to match current decisions about inputs, output and planning to future demand and costs when change could easily alter the market situation in either the short or the long run.<sup>189</sup> They also took place in space, leading to transportation costs.<sup>190</sup> Regardless of the differences between branches of production, "and even though the progress of civilization tends to diminish the uncertainty involved, it is certain that an appreciable degree of uncertainty regarding the quantity and quality of a product finally to be

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<sup>187</sup> Ibid., 8-10; *Principles*, 56-57.

<sup>188</sup> Ibid., 126; *Principles*, 152.

<sup>189</sup> Ibid., 22-24, 43-45; *Principles*, 68-70, 87-89; see also Endres, *Neoclassical Microeconomic Theory*, 167-71, on the challenges of entrepreneurial decisions over employing capital under these conditions, and a useful contrast with Böhm-Bawerk's views showing Menger's greater subjectivism in capital theory. Note also that the emphasis on time and dynamics in the Austrian economic tradition may be related to the use, following Menger, of a cause-effect orientation in economics rather than a functionalist orientation—that is, one which aimed to address the question of how the parts within a static system interacted, as Walras did. See Gloria-Palermo, *Evolution of Austrian Economics*, 29.

<sup>190</sup> Ibid., 170; *Principles*, 189. Menger even reminded his readers here of the operation of the much-neglected but important category of transaction costs in the case of almost any exchange.

obtained [through production] will always be present,” to a greater or lesser degree.<sup>191</sup> The problem of insufficient information which faced all economizing individuals was exacerbated here by the special circumstances of planning production within business firms, which called forth whole new professional classes for gathering and updating accounts and statistical data and for business reporting, all of which is nonetheless “subject to severe fluctuations” in quality as it too can only be gathered in real time and on occasion.<sup>192</sup> The planning activities of producer firms under such conditions appeared throughout the sections on higher-order goods in the *Grundsätze* as an activity of individuals, and consequently the figure of the entrepreneur as decision-maker took on a pivotal role as the agent responsible for dealing with these problems of time, uncertainty and error. The entrepreneur was no cipher, no mechanism for instantaneous equilibration as in Walras; instead, he or she was said by Menger to serve several functions under these non-ideal conditions: obtaining information; having responsibility for economic calculation, or the handling of the computations necessary for production to take place in an efficient way; “the *act of will* by which goods... are assigned to a particular production process”; and supervision or management of the process.<sup>193</sup> Firms, like individuals, faced a market

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<sup>191</sup> Ibid., 24; *Principles*, 70.

<sup>192</sup> Ibid., 48-51; *Principles*, 91-94. As Streissler once put it, “Mengerian man thus knows little about the present, though, interesting[ly] enough, he is constantly trying to increase his knowledge, creating social institutions to gather information, empowering growing droves of middlemen to act on his behalf. Still less than about the present does he know about the future. Again and again Menger stresses the time dimension of goods and the amount of uncertainty this entails”: “To What Extent Was the Austrian School Marginalist?” in R.D.C. Black, A.W. Coats, and C.D.W. Goodwin, eds., *The Marginal Revolution in Economics: Interpretation and Evaluation* (Durham, N.C.: Duke, 1973), 160-75, here 167. On the active, decision-making role of Menger’s entrepreneur in coordination of information within the vertically disintegrated production process of moving from higher-order goods down the value chain to consumer goods *in time*, see Robert Hébert’s and Albert Link’s misleadingly titled history of *ideas* about entrepreneurship, *A History of Entrepreneurship* (London: Routledge, 2009), 42-44.

<sup>193</sup> Ibid., 137; *Principles*, 160. N.B.: Menger’s emphasis.

“process” rather than a static state, and real individuals facing real and incompletely cognized conditions were the only forces *tending* toward equilibrium.<sup>194</sup>

Although Menger was an economist rather than a sociologist, he provided a further indication of the potential usefulness of this interpretive social scientific approach to the explanation of social institutions through his theory of what would later be called “spontaneous order”: regular social phenomena introduced by unintended actions. Most famously in his theory of money, he traced the logic by which the difficulty of finding just the right bartering partner for mutually advantageous trade led, through the same features of human economizing activity described in his theory of exchange, to the growth of one particular marketable commodity as the currency in which all others were traded—without any need to posit intentional creation of money through legislative fiat.<sup>195</sup> But he suggested the same kind of analysis could be applied to the growth of new settlements, the state, law, language and morals, as well.<sup>196</sup> Detailed examination of this feature of Menger’s work is unnecessary as it is tangential to the current discussion. Instead, it need only be observed that even though a central feature of Menger’s spontaneous order explanations lay in the *unintended* consequences of individual actions, the actions themselves came about in the same sort of way as the economizing actions of decision-making individuals oriented toward subjectively set goals and possessing limited knowledge.<sup>197</sup> Large-scale and complex social phenomena could be explained on the basis of individuals’ meaningful actions even when there was no direct intention to create them. Although it awaited

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<sup>194</sup> Erich Streissler, “To What Extent Was the Austrian School Marginalist?” 172-174; see the essays in Israel Kirzner, *The Meaning of Market Process: Essays in the Development of Modern Austrian Economics* (London: Routledge, 1991).

<sup>195</sup> See *Grundsätze/Principles*, Ch. VIII; *Untersuchungen*, 172-178; *Investigations*, 152-155; Gerald P. O’Driscoll, “Money: Menger’s Evolutionary Theory,” *History of Political Economy* 18:4 (1986), 601-616. Obviously Menger was not the first to create a theory of spontaneous order, which was a topic of interest to Adam Ferguson and other Scottish Enlightenment figures.

<sup>196</sup> Menger, *Untersuchungen*, 178-181; *Investigations*, 156-157; Appendix VIII contains a more detailed study of the law example.

<sup>197</sup> The explanation in the passages cited above uses the language of “individual interests.”

Joseph Schumpeter to coin the term “methodological individualism,” this method was already present in Menger, for whom there was no need to posit real “organic” unities or social forces, and who took a dim view of hypostatizing the results of such actions as the “fiction” of collective entities.<sup>198</sup>

In short, in his approach to understanding both individuals and the major social or institutional formations characteristic of his chosen social scientific domain, the competitive market economy, Menger treated the subject matter of social science as inevitably made up of individual, subjectively meaningful actions and valuations. The analysis of economic and social phenomena was in turn essentially a matter of explaining the *effects* of such meaningful individual actions, intended or unintended. The contrast with Walras, and with nineteenth-century positivist and statistical-determinist attitudes, is quite clear. Walras aimed at a scientific economics not only in making the discipline amenable to mathematical methods,<sup>199</sup> but by assuming that human actions could be studied without attention to questions of subjective meanings. True, Walras’ theory of value was subjective in that he derived value from the comparison of amounts of utility under scarcity, but despite his pride in the discovery of marginal analysis, the theory of value was always of relatively minor importance to his scientific work, the presentation of the theory of general equilibrium.<sup>200</sup> Certainly, as we saw above, removing intentionality and subjectivity in decision-making in favor of what amounted to a mechanical stimulus-response model allowed him to draw much more rigorous conclusions, which could compel acknowledgement from anyone who accepted his premises—a much more difficult proposition for those who took subjective meanings into account. Menger rejected

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<sup>198</sup> See, e.g., *Untersuchungen*, 86, 235-236; *Investigations*, 93, 194-196.

<sup>199</sup> In *economic theory*. Others, including Jevons, began the process of employing quantitative methods in the area of what would later become known as econometrics.

<sup>200</sup> Jaffé, “Menger, Jevons, and Walras,” 515.



stimulus-response readings of human behavior, and despite the fact that his educational formation took place in the 1860s, he rejected positivism more broadly, particularly in the form of “idle play with external analogies between the phenomena of the economy and those of nature.”<sup>201</sup> The path which we designated above as positivist—which sought to approach scientific status through the assumption that subjective mental states and values need be of no concern of the social scientist—was no more appealing to Menger than to the other advocates of value-freedom.

But of course Menger’s economics bore no resemblance to a cognitive-relativist type of hermeneutic understanding in its treatment of socioeconomic life, either. He intended his work to provide a more satisfactory scientific foundation on which practical businesspeople could build in understanding the economic activities in which they took part.<sup>202</sup> We will critically address the details of Menger’s implicit position on objective knowledge below, but it remains to argue that his theory of social science shared the other main feature of the “interpretive social science” tradition, as defined here: recognition of the need for a theory-based criterion for selecting out significant features of the complex world of human beliefs, values, and actions in order to allow for causal explanation. If the comparison with Walrasian economics helped to distinguish Menger from the positivist version of objective social science, the clarification of his views on economic theory will help to differentiate his version of interpretive social science from

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<sup>201</sup> Menger, *Grundsätze*, vii; *Principles*, 47. We will see presently how he rejected methodological monism and the view that natural scientific methods were the appropriate methods for the sciences which studied human beings as well, two characteristic positivist doctrines. Menger appreciated the work of Comte, to whom he often referred, and whose broad picture of the stages of human intellectual development toward positive thought he accepted: for instance, in a letter to Georg Jellinek of 6 December, 1904, Menger denounced “mystical theories of state law” and wrote that “What we really need is a scientifically secured foundation for the ethical sciences, whose general doctrines are unfortunately still found at the level of the metaphysical stage of development”: Nachlass Georg Jellinek, Bundesarchiv Koblenz, NL 1136/17. But he also recognized his distance from Comte, noting in his author’s copy of the *Grundsätze* that “Comte is against my method”: Kauder, ed., *Carl Mengers Zusätze*, 18. An explicit rejection of “positivism” in his 1889 essay on the classification of the sciences used the term in a merely polemical usage to refer to the mindless gathering of historical evidence: e.g., “Grundzüge,” 200; “Systematic Classification,” 15.

<sup>202</sup> Menger, *Grundsätze*, v-vi; *Principles*, 45-46.

the Schmollerite historical school on the other side. The difference lay, first, in the “source” of theory, and second, in the question of how theory was useful in gaining knowledge of the economy. For Menger, theory itself could never originate out of a mere mass of descriptions of “real” economic life coupled with the hope that it would someday be possible to induce regularities from them; and it was only “one-sided” theory which could provide useable knowledge. Like Weber later, Menger would identify the major task of theory with the establishment of *types* and relations of types.

Fortunately, Menger’s methodological writings are very clear about the division of labor within the discipline of economics, and indeed within the sciences as a whole, allowing us to identify the role he allotted to *theoretical* research with ease. We will first describe Menger’s taxonomy of the sciences and then demonstrate the importance of its divisions by showing how they contribute to his particular vision of theory-based interpretive social science. His taxonomy starts out from the observation that it is possible to divide the disciplines along two different lines: either they can be considered with respect to the substantive area of their focus, or they can be considered with respect to the methods they employ.<sup>203</sup> That is, the sciences may be divided according to an ontological difference between their objects—in which case the main division becomes that of the natural and the human sciences—or they may be divided by their cognitive interest in either the general or the particular. Menger was thus one of the first methodologists to call attention to this distinction, and, unlike the Baden neo-Kantians but like Dilthey, who explored similar matters in the same year (1883), Menger saw the more basic of the two possibilities as the ontological one.<sup>204</sup> Menger did not view it as appropriate to carry over natural

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<sup>203</sup> Menger, “Grundzüge,” 189; “Systematic Classification,” 4.

<sup>204</sup> Ibid. Oakley, *Foundations of Austrian Economics*, 53-54 and Ch.3 *passim*, places much emphasis on the fact that Menger’s basic commitment was to an ontological distinction between human and natural phenomena, suggesting that this was at the root of his subjectivism, but that he failed to accept its consequences for the ultimate

scientific methods to the human domain for explanatory purposes, even as he demonstrated great respect for the achievements of natural science and frequently used examples from those sciences.<sup>205</sup> As he wrote already in the 1871 preface to his *Grundsätze*, “every method of investigation acquires its own specific character from the nature of the field of knowledge to which it is applied. It would be improper, accordingly, to attempt a natural-scientific orientation of our science.”<sup>206</sup> Methods in economics, as in any science having to do with human beings, must accept and recognize the inherent differences between human subjects and natural objects as *explananda*. As we have seen, this meant in practice that reference to human consciousness could not be avoided.

The point of departure from the historicists became apparent in the next stage of the taxonomy, however, since for Menger, it is necessary to differentiate the sciences according to method as well, *within* the bounds of the distinction between human and natural phenomena. The human world, like its counterpart, was an intricate entity; Menger referred to the “complexity” and “vastness” of the “full empirical reality” of the world itself and of its phenomena.<sup>207</sup> However, it was not simple a welter of contingent happenings; it was not the extensively and intensively “infinite” manifold of “irrational” reality, unknowable in-itself, of the southwest German neo-Kantians.<sup>208</sup> Both the human and the natural world could be known directly, as we shall see below in section b), and they could be known in two ways: with reference to their concrete and particular features or with reference to their general features.

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unpredictability of human actions, thus rendering his theory of science a failure. Oakley relies for his interpretation of Menger’s ontological views on the foundational research by Barry Smith, summarized in Smith, *Austrian Philosophy: The Legacy of Franz Brentano* (Chicago: Open Court, 1994), Ch.10. We return to these issues in the following section.

<sup>205</sup> E.g., Menger, *Untersuchungen*, 38-39, n.18; *Investigations*, 59-60, n.18. For a discussion of Menger’s criticisms of the confusion of the human sciences with the natural sciences and the assumption that the former may be treated like the latter, see Nau, “*Wissenschaft vom Menschen*,” 125-126.

<sup>206</sup> Menger, *Grundsätze*, vii; *Principles*, 47.

<sup>207</sup> E.g., Menger, *Untersuchungen*, 34, 253n.140; *Investigations*, 56, 209n.140.

<sup>208</sup> See above, Chapter I.

This represented a distinction between methods, the individualizing and the generalizing, which could in principle be deployed in any science.<sup>209</sup> The distinction formed the basis for Menger's contention that economics had as its divisions: *history* and *statistics*, seeking the particular in all the richness of and complexity of its diachronic and synchronic manifestations; *economic morphology*, seeking the general structural forms taken by economic phenomena, much as biological morphology studied the general structures of living things; and *economic theory* proper, seeking the regular and recurrent *relations* between general structural forms—in short, laws.<sup>210</sup> The two generalizing branches, economic morphology and economic theory, could each be found in two basic varieties, which Menger named the *realistic-empirical* and the *exact*. We will shortly have more to say about these varieties, but the basic difference between them was that the latter aimed to identify the truly universal and necessary recurring forms and relations between recurring forms, while the former offered an approximation to the exact approach, especially in cases where phenomena were extremely complex.<sup>211</sup> The purpose of theoretical knowledge of either kind was the same: to extrapolate from observed regularities to unobserved regularities, thereby allowing some varying degree of explanatory power and prediction which could be used for practical purposes, or as Menger put it, “understanding of the real world, knowledge of it extending beyond immediate experience, and control of it.”<sup>212</sup>

This schema makes Menger's objections to the procedure of the historical school readily apparent. The historical approach to the human world was the classical form of the individualizing method; Schmoller's program of descriptive studies aimed at considering *all*

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<sup>209</sup> The basic taxonomy is presented in Menger, *Untersuchungen/Investigations* Book I, Ch.1 passim; “Zur Kritik der politischen Oekonomie,” 115-116; “Grundzüge,” 189-90; “Systematic Classification,” 4.

<sup>210</sup> This discussion of Menger's division of the sciences relies on the terminology first used in his 1889 article, the “Grundzüge,” instead of that presented in the 1883 *Untersuchungen*. There are no substantive differences between the two except that in the earlier text, Menger had simply divided the task of “theory” between what he later called morphology and theory proper.

<sup>211</sup> Menger, *Untersuchungen*, 51-53; *Investigations*, 68-69.

<sup>212</sup> *Ibid.*, 33; *Investigations*, 55.

potentially relevant influences on the particular form of economic activity or institution under discussion.<sup>213</sup> Insofar as it sought laws of the economy, these were supposed to emerge from this gathering of exhaustively described economic institutions by a process of induction. However, because the historical method for Menger was defined by its exhaustive individualizing, by its nature it could never yield any sort of theory without ceasing to be historical. History was the polar opposite of exact theory; it “has the task of making us understand *all* sides of *certain* phenomena,” while “exact *theories* have the task of making us understand only *certain* sides of *all* phenomena in their way.”<sup>214</sup> Menger’s point was that even if a historical economist looked up from writing historical monographs on specialized topics long enough to reflect on their implications for theory—even realistic-empirical theory—in so doing he would be abstracting from reality to some determinable degree and therefore cease “doing history.”<sup>215</sup> Even realistic-empirical theory could not reproduce the “full empirical reality” which the historian sought, making the idea of a universal *theoretical* social science which could cover *all* aspects of a phenomenon a “phantom.”<sup>216</sup> The historian even marginally interested in the development of theory would consequently be compelled to acknowledge the legitimacy of pursuing theory that abstracted to some extent from reality—that is, to acknowledge the equal legitimacy of Menger’s own scholarly activity alongside historical studies.<sup>217</sup> What, then, was the source of theory? We

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<sup>213</sup> Menger identifies this (in his view deeply mistaken) aim to achieve a single, complete, all-rounded descriptive science at various points, before and after Schmoller’s 1883 review of the *Untersuchungen* in which he embraced the descriptive ideal: *Untersuchungen*, ix; *Investigations*, 25; “Grundzüge,” 192-193; “Systematic Classification,” 7.

<sup>214</sup> Menger, *Untersuchungen*, 68; *Investigations*, 79.

<sup>215</sup> *Ibid.*, 68-69, 111-114; *Investigations*, 79-80, 109-111.

<sup>216</sup> *Ibid.*, 34-36, 66; *Investigations*, 56-57; 78.

<sup>217</sup> The traditional view of the *Methodenstreit*, that it was based on a contest between inductive and deductive methods, or Bostaph’s view that it was based on epistemological differences, are not wrong so much as incomplete; this reading allows for the further difference that the point which exercised Menger was the wrongheadedness of claiming to base theory on *complete* descriptions covering all aspects of individual cases with no selection criterion; even an enumerative induction procedure could not accomplish this. For a recent interpretation of Menger’s view which treats this set of issues as an argument against theory derived from induction, see Milford, “Carl Menger und die Ursprünge der Österreichischen Schule der Nationalökonomie,” 56-58.

will return to Menger's answer in section b), but we can now see why the source could not be induction from the results of a purely individualizing historical description.

Because Menger did not share the neo-Kantian view of reality as an “irrational” and infinite manifold which could only be approached in its individual features through conceptualization (abstraction), he did not explicitly quarrel with the historical economists' claims for the possibility of complete description of particulars. He did not make the claim that our knowledge of purely *historical* facts or particulars must be theory-determined—for example, that it was not possible to collect instances of theory-free “economic” or other kinds of particulars at all, because some kind of theory was necessary to identify any given phenomenon as economic in the first place.<sup>218</sup> However, he clearly thought it rather unlikely that the historical economists could pursue even their historical task itself without at least implicitly relying on the results of theory.<sup>219</sup> And some of his limited remarks on the subject of historical methodology indicated an awareness that even in history, focused on the concrete as it was, some criterion was necessary for separating the important from the unimportant phenomena available to the historian as raw data. “Which phenomena of human life is it the task of the historical sciences to lift out of the vastness [of empirical reality] and to present?” he asked, and supplied two possible answers in two separate footnotes. Either, as he continued in this context, the historical sciences had the task of presenting any concrete individual phenomenon belonging to their domain “only insofar as it is per se significant for the *collective image of human life*. Only in this way can they satisfy their particular task *universally*.”<sup>220</sup> Or, as he suggested in another place, the historical and statistical sciences must focus instead on that material which distinguishes itself as

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<sup>218</sup> Nau, *Eine “Wissenschaft vom Menschen,”* 115, suggests that Menger did make this claim, but I do not read him as quite reaching this argument, regardless of its appropriateness to his overall position.

<sup>219</sup> E.g., Menger, *Untersuchungen*, 18, 89; *Investigations*, 45, 94.

<sup>220</sup> Menger, *Untersuchungen*, 253 n.140; *Investigations*, 209 n.140.

significant by virtue of signaling “the movement of society” or historical *change*, which would appear to make history a more theoretical discipline, whether or not the notion of historical “laws” was accepted.<sup>221</sup> These suggestions implying that even historical knowledge of the economy was under a purely logical obligation to make reference to some sort of theoretical criterion were not systematically developed or justified with arguments, and his notion of an individualizing historical science thus did not lead him in the direction of any analogue to the later idea of value-relevance for explaining individual historical formations. But if Menger’s interest in the methodology of historical scholarship was limited, in the area of economic knowledge in which he was interested—the generalizing branch—he did identify and develop a selection criterion.

Because any sort of knowledge that renounced the exhaustive-description ideal (any sort of non-historical, theoretical knowledge of the economy) would by definition have to abstract from reality, this raised the need for some criterion of selection as the basis for deciding *how* to abstract.<sup>222</sup> Menger’s answer followed from his distinction between individualizing and generalizing sciences. Although particular phenomena might possess many attributes which could be abstracted from them and separately considered, only some of these attributes were *general* forms which could be discerned in multiple cases. As Menger observed near the beginning of his *Untersuchungen*, “[i]n spite of the great variety of concrete phenomena, we are able, even with cursory observation, to perceive that not every single phenomenon exhibits a particular empirical form differing from that of all the others. Experience teaches us, rather, that definite phenomena are repeated, now with greater exactitude, now with lesser, and recur in the

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<sup>221</sup> Ibid., 8-9 n.7; *Investigations*, 39 n.7. For yet another briefly stated conception of the proper task of scientific history, emphasizing source criticism, see *Untersuchungen*, 8 n.6; *Investigations*, 38 n.6.

<sup>222</sup> See Karl Milford, “Menger’s Methodology,” in Bruce Caldwell, ed., *Carl Menger and His Legacy in Economics* (Durham: Duke University Press, 1990), 220.

variation of things.”<sup>223</sup> These repeating forms could be identified and labeled as “types” by the morphological branch of economic inquiry so that they could thereafter be readily located wherever, and in whatever sequence, they were found within a given slice of reality. Regularities in the sequence of types formed the subject matter of theory proper; put in other words, these general *forms of relations* between general *morphological forms* constituted laws. As examples from the realm of economics, Menger gave “the phenomena of purchase, of money, of supply and demand, of price, of capital, of rate of interest” as types and such relationships as “the regular drop in price of a commodity as a result of an increase in currency, the lowering of the rate of interest as a result of considerable accumulation of capital, etc.” as typical relations or laws.<sup>224</sup> The type thus served as the selection criterion for anyone with a cognitive interest in explaining or predicting causal sequences—the purposes specific to theoretical science.<sup>225</sup>

Not all general forms were created equal. Menger suggested that some were universal, while others held across a limited domain in space or time.<sup>226</sup> One had to acknowledge simply based on the nature of human thinking, he stated, that “*whatever was observed in even only one case must always put in an appearance again under exactly the same actual conditions*; or, what is in essence the same thing, that strictly typical phenomena of a definite kind must always, and indeed in consideration of our laws of thinking, simply of *necessity*, be followed by strictly typical phenomena of just as definite and different a type.”<sup>227</sup> Thus, when dealing with types which were truly universal and contained no admixture of the particular at all, causal relationships in particular sequences could be determined with absolute certainty; these were

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<sup>223</sup> Menger, *Untersuchungen*, 4; *Investigations*, 36, on which most of this paragraph draws.

<sup>224</sup> *Ibid.*; see also 12-13; *Investigations*, 42, for a few other examples.

<sup>225</sup> *Ibid.*, 34, 253 n.140; *Investigations*, 56; 209 n.140, commenting on the theoretical as well as the historical sciences’ need to pick out universal elements from complex reality.

<sup>226</sup> Nau, *Eine “Wissenschaft vom Menschen,”* 127-137, provides a good survey of Menger’s ideas on the two kinds of types.

<sup>227</sup> *Ibid.*, 40; *Investigations*, 60.



exact laws.<sup>228</sup> Realistic empirical types and laws did not at all possess such certainty, yet they were also closer to the real world. Real types presented the “basic forms of real phenomena, within the typical image of which, however, a more or less broad scope is given for particularities (also for the development of the phenomena!),” while empirical laws represented a form of “theoretical knowledge... [of] the actual regularities (though they are by no means guaranteed to be without exception) in the succession and coexistence of real phenomena.”<sup>229</sup> They were thus differentiated both by their level of abstraction from reality and by their level of certainty. The former did not change, while the latter could.<sup>230</sup> Neither had a special set of phenomena to which it alone was appropriate; both types could be sought and identified in all phenomena,<sup>231</sup> and naturally many phenomena exemplified multiple types and stood in multiple lawful relationships. Because exact laws represented fully certain knowledge of their respective “corners” of reality within all phenomena, when coupled with the laws produced by all other exact theories, in other sciences, the sum total of exact theory would provide certain knowledge of *all* of reality—with one exception.<sup>232</sup> Until and unless this state in the development of the sciences was reached, the possibility of which Menger regarded as an open question, realistic-empirical laws would provide necessary supplements, and only the combination of the two approaches “can procure for us the deepest theoretical understanding of the phenomena considered here which is attainable in our age.”<sup>233</sup> Even in the absence of the complete certainty guaranteed by a full complement of developed exact sciences, realistic-empirical methods could

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<sup>228</sup> See also Milford, “Carl Menger und die Ursprünge der Österreichischen Schule,” 56-57; critique of Menger’s reasoning in Oakley, *Foundations of Austrian Economics*, 81. We will return, critically, to Menger’s justification of the idea of exact types and laws in our discussion of objectivity in the following section. For now, it is important only to note that for Menger, theory proceeded by discerning and using types.

<sup>229</sup> Menger, *Untersuchungen*, 36; *Investigations*, 57.

<sup>230</sup> E.g., *ibid.*, 106-114; *Investigations*, 106-111.

<sup>231</sup> *Ibid.*, 26, 51-53; *Investigations*, 51; 68-69.

<sup>232</sup> *Ibid.*, 44, 64-65; *Investigations*, 62-63, 77-78.

<sup>233</sup> *Ibid.*, 154-155; *Investigations*, 140.

still provide the social scientist with criteria for discovering repeating forms that would allow *some* degree of explanation, prediction and control, something historical description could never achieve.<sup>234</sup> Both were on display in Menger's economics, as we examined it above; his willingness to take realistic-empirical theory seriously should not be underrated, since it is embodied in his own work.

The caveat above, "with one exception," was necessary, however. For while strictly lawful, certain, and predictable knowledge could be had of many phenomena, provided one could gain access to all of the relevant exact types and typical laws, and while this was as true of the realm of human life as of nature, Menger did not want to argue that the human world was completely determined in the manner of the natural world.<sup>235</sup> He accepted the doctrine of "freedom of the human will" ("we have, of course, no intention of denying this as a practical category"),<sup>236</sup> and he realized that a critic might contest the possibility of laws of economics because of the free will of economizing human subjects. Still, granting human subjects the ability to alter their behavior, he wanted to argue that there remained important uniformities in economic actions. "Although reference to freedom of the human will may well be legitimate as an objection to the complete conformity to law of economic activity," he wrote, "it can never have force as a denial of the conformity to law of phenomena that condition the outcome of the economic activity of men and are entirely independent of human will. It is, however, precisely the latter sort of phenomena which are the objects of study in our science."<sup>237</sup> Thus, although the data of economic science consist of actions taken freely by human beings on the basis of their

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<sup>234</sup> Ibid., 38; *Investigations*, 59; Menger was quite adamant in reminding the reader that realistic-empirical theory was not to be confused with historical economics merely because of its lesser certainty: *ibid.*, 26-28; *Investigations*, 51-52.

<sup>235</sup> For the equal applicability to human phenomena, see *ibid.*, 26; *Investigations*, 50-51.

<sup>236</sup> *Ibid.*, 259-260; *Investigations*, 214; see also Kauder, ed., *Carl Mengers Zusätze*, 21ff. for his support for free will and rejection of T.H. Buckle, the quintessential deterministic positivist writer.

<sup>237</sup> Menger, *Grundsätze*, ix; *Principles*, 48-49.

subjectively determined intentions—for instance, two individuals trading corn for horses according to their particular wants—some certain and objective knowledge can be gained from these data by identifying the typical features which arise out of them—for instance, diminishing marginal utility and the range of values within which trades will occur.

We may conclude, therefore, that Menger's aim as a social scientist was ultimately the complete and certain explanation not of the entire human world but of any *given* situation, where subjectively determined human purposes and contingent individual life histories and needs remained the essential "given" factor.<sup>238</sup> He pursued the development of exact theory in particular because he believed that if it were developed not only in economics but in all the other sciences bearing on human life, it might be possible to achieve such certainty: not by exhaustively describing every feature of reality, but precisely by deploying one-sided viewpoints in order to yield understanding of the types and typical laws involved, and then by combining each one-sided viewpoint with the others.<sup>239</sup> But even if exact laws must abstract from some of the realistic assumptions which characterized Menger's economics, such as incomplete rationality and information, they could not render the purposes of free-willed human beings endogenous; the latter were not capable of objective determination by theory. This was a major reason why Menger could never view the task of economics as establishing a general equilibrium model of the entire economy along Walrasian lines; such a total system would require the elimination of subjective individual decisions as we saw above. An economics which took subjectivity seriously could not make the assumption of "stable preferences," in the modern locution—preferences, or really, "wants," could change at any time,<sup>240</sup> and it was the task of

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<sup>238</sup> Menger, *Untersuchungen*, 264; *Investigations*, 217-218.

<sup>239</sup> *Ibid.*, 64-65; *Investigations*, 77-78.

<sup>240</sup> See his acceptance of this contention from Knies, in Kauder, ed., *Carl Mengers Zusätze*, 42.

economic analysis to address their effects in given instances.<sup>241</sup> Erich Streissler once suggested that this sort of subjectivism in Menger “meant that he eschewed deriving concrete results. He was content to show all the manifold dimensions of causation in the economic field. In his view the final outcome of all these forces at work could not be fully described.” While this was true of Menger’s analysis of the economy as a whole, and has obvious bearing on the adequacy of Menger’s hopes for the predictive capacity of the sum-total of all exact sciences, Streissler’s final judgment that as a result “he ended in doubt” is not accurate.<sup>242</sup> He ended instead with a tool for analyzing given situations: a tool very useful for interpretive social science, and one quite similar to that used in Weber’s work, with its attempt to explain particular social and economic formations generated by a combination of human subjective intentions and material conditions on the basis of theoretical types.<sup>243</sup>

Of course, recognition of free will and acknowledgement of the importance of subjective decision-making are not at all equivalent to *value subjectivism*, the doctrine that there are no objective or rationally decidable grounds for preferring one set of values or goals to another. One could easily posit both free will and an objective moral law with morally deliberating agents whose mental states and intentionality must be taken into account by social scientific explanation. But Menger did make the shift from taking human subjectivity seriously to value subjectivism, and thence to value-freedom.

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<sup>241</sup> See especially Oakley, *Foundations of Austrian Economics*, 60; I concur with his interpretation of Menger’s occasional locutions implying more biologically-based “objective” wants and needs: they are not in fact objectively given by nature but are rather a function of the individual’s contingent total history, including previous subjective decisions as well as biology. In other words, they can only appear objective once they are taken as “givens” in a particular situation, not in any absolute sense. For more on the subjectivity of wants in the context of value, see immediately below.

<sup>242</sup> Erich Streissler, “To What Extent Was the Austrian School Marginalist?” 174-175.

<sup>243</sup> Compare Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, 5<sup>th</sup> ed. (Tübingen: Mohr, 1982), 45-46, on the confusion of lawfulness with determinedness in assessing human action.

## **b) Value, Value-Freedom and the Problem of Objective Knowledge**

Like the other figures considered in this dissertation, Menger came to regard human valuations as having no rationally grounded basis which would serve as compelling one value choice over another, and we must begin by showing that he held this view more or less consistently. The only variety of the phenomenon “value” which Menger explicitly discussed in his writings was, not surprisingly, economic value, and it is his views on this subject which provide the basis for concluding that he was a value subjectivist.

In the theory of economic value, the terms of discussion for the nineteenth century had been set by the various “objectivist” stances of classical political economy in Britain, against which a number of German economists would react before Menger adopted their views. In explaining exchange value, despite their differences, the classical economists had broadly preferred to argue that the proper (“real” or “natural”) measure of a good’s value was objectively embodied in the good in the form of the various costs which were incurred to produce it—whether these were analyzed as ultimately reducible to the amount of labor necessary (the labor theory of value) or whether they separately included the costs of ground rent or capital (a cost-of-production theory).<sup>244</sup> While a good must be useful for exchange to occur, its utility or value-in-use was not the determining factor.

Although the paradoxes and difficulties caused by the labor theory of value in particular troubled British political economy in the first part of the nineteenth century, German academic economists took an entirely different path. In a series of important papers, Streissler demonstrated that a longstanding tradition of subjective value theory preexisted Menger in Germany, and that economists in this tradition had in fact already evolved all of the elements

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<sup>244</sup> Amidst a sea of literature on the topic, see Spiegel, *Growth of Economic Thought*, 248-50, 320-22.

associated with the later Austrian theory of Menger, Böhm-Bawerk and Wieser, including diminishing marginal utility, the equimarginal principle, and the idea of opportunity cost.<sup>245</sup> While the evidence that marginalism was not “new” in 1871 is important, the only issue relevant here is the subjectivist tradition. Beginning as early as 1807 with Gottlieb Hufeland’s *Neue Grundlegung der Staatswirthschaftskunst*, mainstream textbook writers had argued that goods “are only goods by virtue of the mind-picture which one man or several men make themselves of them” and that “Value [is] a relationship between all goods in human consciousness...[it is] predominantly of a *subjective* nature.”<sup>246</sup> Even before Ricardo, in Hufeland’s case, and subsequently in opposition to the Ricardian labor theory version of objective value theory, which it became “standard German practice” to attack, these subjectivist writers aimed to replace the “cost-of-production theory of value by a price theory mainly geared towards demand.”<sup>247</sup> Demand was conceived in terms of utility or value-in-use (treated synonymously), and trade could generate as much value, subjectively conceived, as production.<sup>248</sup> Subjectivism meant in this context: that value depended entirely on the mental assessment of personal wants and needs when an agent was confronted with any social fact or situation, a subjective judgment as to whether it constituted a good (or service) and if so how to measure it against others, and much historical variety in valuation even in the case of such apparently “objective” needs as food and shelter.<sup>249</sup> These positions were very well known to Menger, which explains his attempt to associate himself with the German tradition in economics at the end of the preface to the

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<sup>245</sup> Erich Streissler, “Die Wurzeln der ‘Österreichischen Schule’ der Nationalökonomie in der deutschen Wirtschaftswissenschaften des 19. Jahrhunderts,” *Anzeiger der phil.-hist. Klasse der Österreichischen Akademie der Wissenschaften*, 126 (1989), 169-185; “Carl Menger, der deutsche Nationalökonom,” in Bertram Schefold, ed., *Studien zur Entwicklung der ökonomischen Theorie* (Berlin: Duncker & Humblot, 1990), 151-195; and “Influence of German Economics on the Work of Menger and Marshall,” as above.

<sup>246</sup> Streissler, “Influence of German Economics,” 42-43, quoting Hufeland and Albert Schäffle respectively.

<sup>247</sup> *Ibid.*, 41, 47.

<sup>248</sup> *Ibid.*, 43, 47.

<sup>249</sup> Milford, “Carl Menger und die Ursprünge der Österreichischen Schule,” 26-27.

*Grundsätze*, and why he could see himself as sharing with such figures as Roscher and Knies a common subjectivist stance against the British classical economists.<sup>250</sup>

Nonetheless, the continuity between the economists of this tradition and Menger can be exaggerated. While they accepted the idea that valuation was subjective in the sense of requiring reference to human perceptions of wants or needs, instead of being a function of external things (quantities of labor or long-run costs), these earlier figures did not suggest that value was subjective in the sense of being founded on no more than an “arbitrary” individual decision or preference. After Hufeland, most of the economists in this German tradition coupled their subjective theories of value with a methodological collectivism that saw individuals as parts of a national or cultural whole.<sup>251</sup> Their interest lay not in an assessment of “market allocation on the basis of individual valuations” but in the relationship of the economic phenomena of the market on the one hand and those governed by the quasi-cameralist, order-providing state on the other; and above all, they presented economic valuation within a moral context purporting to objective validity rather than as a function of arbitrary individual preferences.<sup>252</sup>

As for Menger himself, he shared their subjectivism<sup>253</sup> but took it farther by promoting a focus on the individual over the collective as the locus of meaningful action, as we saw above,

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<sup>250</sup> *Grundsätze*, x; *Principles*, 49; for further documentation of Streissler’s claim for Menger’s continuity with this tradition, see Yukihiro Ikeda, *Die Entstehungsgeschichte der ‘Grundsätze’ Carl Mengers* (St. Katharinen: Scripta Mercaturae, 1997), esp. 70-89; for his opposition to the Ricardian labor theory, see further Gilles Campagnolo, *Criticisms of Classical Political Economy: Menger, Austrian Economics and the German Historical School* (London: Routledge, 2010), 266-75. The latter work unfortunately promises more in its title than it delivers, as it is mostly concerned with German idealist thought on the economy, with mid-century “social” writers such as Lorenz von Stein, with Marx, and, in the case of its much shorter discussion of Menger, with a mass of detail on Aristotle and early modern British philosophy. Campagnolo’s work is diffuse and the argument is sometimes difficult to follow.

<sup>251</sup> Karl Milford, “Hufeland als Vorläufer von Menger und Hayek”; Milford, “Carl Menger und die Ursprünge der Österreichischen Schule,” 32-33, 44.

<sup>252</sup> Birger Priddat, “Der ‘Gattungswert’ oder die Moral der subjektiven Wertlehre in der deutschen Nationalökonomie: K.H. Rau, F.B.W. von Hermann, B. Hildebrand, G.W.F. Hegel und A. Wagner,” in Priddat, *Wert, Meinung, Bedeutung*, 249-250.

<sup>253</sup> Wieser suggested on the basis of long personal acquaintance that Menger’s activity as a journalist reporting on economic conditions had sensitized him to the importance of the subjective perceptions of the usefulness of goods in

and by rejecting the tie between economic value and any moral order.<sup>254</sup> Like the German tradition, he defined value in terms of human wants as “the importance that individual goods or quantities of goods attain for us because we are conscious of being dependent on command of them for the satisfaction of our wants.”<sup>255</sup> He then repeatedly stated that value was *attributed* by human beings to objects on the basis of the objects’ relation to *subjectively perceived* wants, rather than inhering in the objects themselves or in the labor that went into producing them.<sup>256</sup> In a passage worth quoting at length for the clarity with which it reveals his value subjectivism, Menger wrote:

“Value is thus nothing inherent in goods, no property of them, nor an independent thing existing by itself. It is a judgment economizing men make about the importance of the goods at their disposal for the maintenance of their lives and well-being. Hence value does not exist outside the consciousness of men. It is, therefore, also quite erroneous to call a good that has value to economizing individuals a ‘value,’ or for economists to speak of ‘values’ as of independent real things, and to objectify value in this way. For the entities that exist objectively are always only particular things or quantities of things, and their value is something fundamentally different from the things themselves.... Objectification of the value of goods, which is entirely *subjective* in nature, has nevertheless contributed very greatly to confusion about the basic principles of our science.”<sup>257</sup>

Such a view was obviously at odds with the labor theory of value, which Menger explicitly rejected on several occasions, noting also the obvious facts that highly valued objects

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fulfilling personal wants or needs, and to the way in which the value of additional units of a good diminished with increasing quantities: Wieser, “Karl Menger,” 89. Perhaps this was the case, although there is no textual evidence for it.

<sup>254</sup> Israel Kirzner, “Introduction,” in Kirzner, ed., *Classics in Austrian Economics*, Vol. 1 (London: Pickering, 1995), xv, rightly stresses that Menger went much farther in his subjectivism than the economists in the tradition recalled by Streissler: from a subjective theory of value to a subjectivist economic theory more broadly.

<sup>255</sup> Menger, *Grundsätze*, 78; *Principles*, 115. “[M]an,” he wrote, “with his needs and his command of the means to satisfy them, is himself the point at which human economic life both begins and ends.” Ibid., 69; *Principles*, 108.

<sup>256</sup> E.g., ibid., 81, 87, 107, 119; *Principles*, 116, 122, 139, 145.

<sup>257</sup> Ibid., 86; *Principles*, 120-121.



might well be attained with no labor at all, while immense amounts of labor might be deployed in producing others which would attain no value at all in the absence of scarcity.<sup>258</sup>

But value not only did not inhere in labor or any other “objective” cost for goods; at its base, it was subjective in the sense of being arbitrarily chosen by different individuals. Different individuals might easily assess the same good as being highly worthwhile or utterly worthless, he wrote; “Goods always have ‘value’ to certain economizing individuals and this value is also *determined* only by these individuals.”<sup>259</sup> Such assessments were, in the last analysis, arbitrary matters, although once the valuation had been ascertained by an individual, it could function as a set and determinate data point. “Our wants, at any rate in part, at least as concerns their origin, depend upon our wills or on our habits. Once the wants have come into existence, however, there is *no further arbitrary element* in the value goods have for us....”<sup>260</sup> Such a view was not capable of being unified with a theory of value that saw it as one part of an objective moral order, and Menger certainly did not advocate the latter. There was no supra-individual “species” of goods useful to *all* human beings as such, a notion that was part of the older economists’ moral order; this kind of value, he noted in response to Hildebrand, “has no *real* existence.... For value arises only in the individual and for him only with respect to concrete quantities of a good.”<sup>261</sup> And he at least implied the out-datedness of ethical or religious conceptions of economic phenomena by

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<sup>258</sup> Ibid., 60-62, 80 (unnumbered note), 119-120; *Principles*, 101-102; 115n.2; 146.

<sup>259</sup> Ibid., 119; *Principles*, 146.

<sup>260</sup> Ibid., 85; *Principles*, 119. These are Menger’s italics, demonstrating that he believed an arbitrary (*willkürlich*, willful) element was indeed at play and simply had its scope limited, contrary to the argument made by Helge Peukert, “Was Carl Menger Subjektivist? Eine Kritik der Streisslerthese,” in Priddat, ed., *Wert, Meinung, Bedeutung*, 309-10.

<sup>261</sup> Ibid., 109, extended note; *Principles*, 297. For this notion of “species” value, and its connection to a non-subjective moral order in the older economists, see Priddat, “Der ‘Gattungswert’ oder die Moral der subjektiven Wertlehre in der deutschen Nationalökonomie.”

suggesting that these were characteristic of ancient and medieval approaches to economics rather than that of “present-day science.”<sup>262</sup>

It must be acknowledged that there are passages in the *Grundsätze* which provide the possibility of a less subjectivist reading, and it has certainly been suggested that Menger was not entirely consistent in his commitment to subjectivism.<sup>263</sup> For instance, he notes the existence of a class of goods – what he calls “imaginary goods” – that cannot satisfy needs even though agents believe that they can (such as primitive medicines), and he notes that through stupidity, ignorance or error, agents may act to pursue short-term pleasure rather than long-term welfare.<sup>264</sup> Here Menger seems concerned not to outline real “objective” needs so much as to question whether goods or actions which people choose to pursue will *in fact* satisfy such needs once the latter are (subjectively) determined. It may readily be acknowledged that he devoted interest and attention to the necessity of certain real material needs for the biological continuance of life.<sup>265</sup> Even in this case, however, he later suggested that the very continuation of life could not be assumed to be a universally valued goal.

These considerations raise the question of whether Menger’s value subjectivism extended beyond the limited domain of the economy. Was it only the valuation of *goods* which was

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<sup>262</sup> Ibid., 2, extended note; *Principles*, 286-287. We examine Menger’s opposition to “ethical” science below.

<sup>263</sup> See, for instance, Kirzner, *Meaning of Market Process*, 74-79; Endres, *Neoclassical Microeconomic Theory*, 33-35.

<sup>264</sup> Menger, *Grundsätze*, 4, 122; *Principles*, 53, 148.

<sup>265</sup> Max Alter places emphasis on the biological underpinnings of Menger’s concept of wants or needs (again, *Bedürfnis* in German), showing in passing that Menger attempted to use biology as a bridge term to mediate between the human willing subject and the lawfulness of nature, and this was connected with his adoption of an Aristotelian conception of causality that included both the efficient cause (the modern notion of causality) and the final cause or teleological mode of causation: see esp. Alter, *Carl Menger and the Origins of Austrian Economics* (Boulder: Westview, 1990), 125-130. In his attempt to make a Romantic-hermeneuticist out of Menger, Alter identifies Menger’s biological interests with Romantic-era “biologism” in a problematic way—problematic because it is not properly grounded in evidence as opposed to plausible argumentation (the first “essay” in Alter’s book is essentially speculative) and because Menger clearly lived in a post-Darwinian world and his writings are laced with nineteenth-century natural scientific references. On Menger’s (obviously unconsummated) desire to develop a framework for unifying or equating causal and teleological analysis, see also Yagi, *Austrian and German Economic Thought*, 46-47.

affected, or did he think that human values more generally were equally subjective? Menger did not address such questions directly. In the *Untersuchungen*, he matter-of-factly embraced historical relativism, noting the obvious “relativity of social institutions and normative laws”: regulations and laws, customs, institutions, and so forth were appropriate to their respective times and places, and might easily vary accordingly.<sup>266</sup> Economic policy proposals and opinions make claim merely to “local” truth, as it were.<sup>267</sup> But such views were not necessarily subjectivist, and unlike Weber, Jellinek, or Radbruch, for instance, Menger gave no indication of moving from historical relativism to an antinomial view of unavoidable value-conflict. Still, two considerations make it likely on balance that he held to some form of value subjectivism beyond the sphere of economic goods. First, he hardly limited his consideration of the activity of valuation to material commodities or business services; if economics for Menger was not yet the “science of choice,” it nonetheless explicitly included many goals, relationships, and intangibles among the objects of economizing agents,<sup>268</sup> and like material goods these possessed no intrinsic value but received their value in the same way as the others, based on subjective considerations at the margin. Secondly, for Menger, the sciences could not pronounce upon values or ends, a position that was really only explicable on the assumption of value subjectivism, the topic to which we next turn.<sup>269</sup>

To recapitulate: we have established above that the starting point of economic analysis for Menger must be the decisions of individual economic actors, which are the outcomes of their wants and their beliefs about how to satisfy these wants through goods. These wants and beliefs

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<sup>266</sup> Menger, *Untersuchungen*, 130-131; *Investigations*, 122-123.

<sup>267</sup> *Ibid.*, 131 n.45; *Investigations*, 123 n.45.

<sup>268</sup> See *Grundsätze*, 5-6; *Principles*, 54-55.

<sup>269</sup> The suggestion of a potential connection between Menger’s subjective theory of economic value and his commitment to “value-free” social science has been made in passing, although not documented, in Raimondo Cubeddu, “The ‘Irrelevance’ of Ethics for the Austrian School,” in Peter Koslowski, ed., *Methodology of the Social Sciences, Ethics and Economics in the Newer Historical School* (Berlin: Springer, 1997), 259-284, here 275.

were subjective in the sense that they required reference to the mental states of individuals rather than to purely external behaviors or attributes of goods. We have now shown that Menger believed that human valuation of the objects or ends of action is subjective in the additional sense of being “rationally ungrounded.” Consequently, the task of economic science was to start from the *inherently* subjective judgments of value made by economic agents, whose “correctness” could not be assessed or made the subject of knowledge, and to analyze their outcomes when translated into actions, in a way that *would* yield knowledge of some degree of certainty, depending on the exactness of the types and laws used in the attempt at explanation. When his value subjectivism was added to it, Menger’s view of theoretical economics as we discussed it above in section a) thus helped lead him to the principal manifestations of his commitment to value-freedom: the separation of theory and practice, and the rejection of the idea of a normative science through the limitation of scientific analysis to consideration of means instead of ends.

From his earliest work at the beginning of the 1870s, there were indications that Menger was committed not only to the idea of an economics which *does not explain* freely selected human ends themselves, but to the idea that science *cannot justify ends*. Menger expressed skepticism about the idea of a normative “moral” science already in the *Grundsätze*, even if such skepticism was not yet a developed doctrine or a central preoccupation. As he wrote in a long footnote to his discussion of returns to land, labor, and capital in the analysis of value in higher order goods, “Among the strangest questions ever made the subject of scientific debate is whether rent and interest are justified from an ethical point of view or whether they are ‘immoral.’ Among other things, our science has the task of exploring why and under what conditions the services of land and of capital display economic character, attain value, and can be

exchanged for quantities of other economic goods (prices). But it seems to me that the question of the legal or moral character of these facts is beyond the sphere of our science.”<sup>270</sup> The “facts” were all that economics pronounced upon; one could not dispute the real existence of rent and interest, nor of the fact that they might sometimes provide a higher return to an owner of land or capital during a given period than the wages a worker might receive for labor in the same period. Menger did not claim that such facts were inevitable or unchangeable, only that without “a complete transformation of our social relations,” those who felt they were immoral would nonetheless have to acknowledge their reality under the present order.<sup>271</sup>

As he began to consider methodological questions in a more intensive manner in the early 1870s after the publication of the *Grundsätze*, Menger’s notes on his reading interspersed into the special “author’s copy” of that work indicate familiarity with, and acceptance of, some earlier economists’ views on the relevant limitations of political economy.<sup>272</sup> He seems to have been particularly persuaded by the formulations of J.E. Cairnes and Pellegrino Rossi, an Italian economist who succeeded to J.-B. Say’s chair in Paris before being assassinated in Rome in 1848. In notes on the “object [and] boundaries of science,” Menger cited pages of the Italian’s *Cours d’économie politique*, which carried the remark that “La science, quel qu’en soit l’objet, n’est que la possession de la vérité.... La connaissance d’un certain ordre de vérités, tel est l’objet, le but particulier d’une science; le moyen, c’est la recherche de ces vérités à l’aide de la méthode. *La science n’est pas chargée de faire quelque chose.*”<sup>273</sup> He interpreted the preliminary

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<sup>270</sup> Menger, *Grundsätze*, 143; *Principles*, 173.

<sup>271</sup> *Ibid.*, 144; *Principles*, 174.

<sup>272</sup> Some of the comments which have a bearing on the doctrine of value-free science have been noted before, by Boos, *Wissenschaftstheorie Carl Mengers*, 147–48, which however devotes only two paragraphs to Menger’s ideas on value-freedom before moving on to discuss the ideas of later thinkers like Ludwig von Mises, Lionel Robbins, and Gunnar Myrdal. Kauder, of course, takes note of them as well, but without any discussion or even concrete reference: Emil Kauder, *A History of Marginal Utility Theory* (Princeton: Princeton University Press, 1965), 92.

<sup>273</sup> “Science, what ought to be its object, is only the possession of truth. . . . Knowledge of a certain order of truths, such is the object, the particular end of a science; the means are the investigation of those truths by method.

discourse in Say's *Traité* as being “against [the] ethical standpoint” in its view of the task of economics.<sup>274</sup> More directly, Menger wrote approvingly following his reading of Cairnes' *Essays in Political Economy*, “[t]hat political economy is a wholly neutral science, neither socialist-of-the-chair nor free-trader, nor communistic,” and he copied out Cairnes' statement that “Whatever takes the form of a plan aiming at definite practical ends... is no science.”<sup>275</sup>

The first published comments in which Menger directly addressed the purported normativity of social science came in the *Untersuchungen* a decade later. Here, treating “the so-called ethical orientation of political economy” to which he suggested a majority of historical economists in Germany adhered, Menger argued “that we cannot rationally speak of an *ethical* orientation of *theoretical* economics either in respect to the exact orientation of theoretical research or to the empirical-realistic orientation.”<sup>276</sup> In part this was so simply for definitional reasons: an exact economic theory could not consider non-economic motives and remain exact, since its entire purpose was to consider “*single sides of the real world*” in isolation from others, while realistic-empirical theory already considered ethical impulses in human beings alongside the other regularities in their conduct from its more probabilistic perspective.<sup>277</sup> Nothing was gained thereby from referring to an “ethical” science, if the latter meant a positive (non-

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Science is not tasked with doing anything else.” Quotation, with italics added, from Pellegrino Rossi, *Cours d'économie politique*, 2d ed. (Paris: Thorel, 1843), 29; from the “second lesson” to which Menger's notes call attention on this topic. Menger was by no means a uniform admirer of Rossi, however: see *Carl Mengers Zusätze*, 10.

<sup>274</sup> Kauder, ed., *Carl Mengers Zusätze*, 15.

<sup>275</sup> Ibid., 7. Menger refers in both cases to Cairnes' *Essays in Political Economy*, p. 252, where the English economist argues against the idea that economics is identical with the doctrine of laissez-faire and more generally that social science should be seen as having specific political goals. The passage reads, “Now I am anxious here to insist upon this fundamental point: whatever takes the form of a plan aiming at definite practical ends, ...—it matters not what the proposal be, whether wide or narrow in its scope, severely judicious or wildly imprudent—if its object be to accomplish definite practical ends, then I say it has none of the characteristics of a science, and has no just claim to the name.” (Cairnes, *Essays*, 252-253). Menger subsequently quotes in English part of this passage, “Whatever takes the form of a plan aiming at definite practical ends...,” and then substitutes his own summary conclusion, “ist keine Wissenschaft.” *Zusätze*, 10.

<sup>276</sup> Menger, *Untersuchungen*, 288; *Investigations*, 235.

<sup>277</sup> Ibid., 288-290; *Investigations*, 235-36. Emphasis in original.

normative) form of economic theory which took ethical motives into account. Nor did it make sense to refer to the practical science of economic policy<sup>278</sup> as an “ethical science.” Here, too, while any policy advice must account for the fact that human actions are shaped by ethical codes, customs, and laws, unless such actions were explicitly subordinated to ethical considerations alone, the label of an “ethical” science would be inappropriate, and in the latter case would in fact constitute an instance of ethical writings about the economy, not economics at all. Perhaps, Menger speculated rather unkindly, the introduction of this inaccurate label had its origins in the desire of some scholars to bring loftier sentiments and topics into their works on such a supposedly base subject as economics, which would bring them greater prestige.<sup>279</sup>

More importantly for our purposes, Menger explicitly rejected not only the inaccurate label of “ethical science” but the idea of a normative science itself as outdated and wrong. “The desire for an ethical orientation of our science is in part a residue of a philosophy that comes from antiquity,” he wrote, “and, in a different sense, of medieval-ascetic philosophy. In good part, however, it is a lamentable crutch for scientific insufficiency, just as in its day the ethical orientation of historical writing was.”<sup>280</sup> Those who claimed to practice it saw their task as being one of judging which goods are “true” goods, and what prices, incomes, and so forth were to be considered as “morally objectionable” by economics itself. “In this, however, as scarcely needs to be noted, there is no ethical orientation of *economic* research, but a *moral* judgment on single phenomena of national economy. This judgment in no way can touch the results of theoretical research in the field of national economy. Any ever so ‘untrue’ or ‘immoral’ good is subject to the economic laws of value, of price, etc., and is thus from the economic

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<sup>278</sup> On which more below. The practical sciences for Menger are not truly normative, as we shall see.

<sup>279</sup> Ibid., 290-91; *Investigations*, 236-37. He further twisted the knife by suggesting that it was an alternative to the more legitimate means of gaining prestige through production of original research.

<sup>280</sup> Ibid., 291; *Investigations*, 237.

standpoint a ‘good’ whose value, price, etc. must be interpreted theoretically just as well as the value or price of goods serving the highest purposes.” Even if economics dispensed with considering purportedly “immoral” goods or phenomena, some other science would have to consider them, since they would continue to exist as facts requiring explanation—and in fact, of course, no other science could be better suited to explain them than economics.<sup>281</sup>

Menger’s views cannot be dismissed as polemical attacks on the historical economists or the advocates of social reform. In addition to the fact that they applied equally to *theorists* who adopted the “ethical” label—such as Adolf Wagner, who would in fact support Menger in the *Methodenstreit* with regard to the inadequacy of historical method alone<sup>282</sup>—Menger clearly extended the criticism to those who saw economics as directly entailing either socialism or laissez-faire. Despite his own economic liberalism and personal preference for a free market, he took from Cairnes the conclusion “[t]hat the principle of Laissez faire has no scientific basis... [and] (is only a practical principle to which there are many exceptions),” which may have been the reason why he also disagreed with Cairnes on attributing “the spirit of the positive philosophy” to the liberal economists Turgot and Ricardo.<sup>283</sup> In his notes in the 1870s, he linked doctrinaire laissez-faire (in the person of Frédéric Bastiat) and socialism as equally unscientific: “Bastiat on the one hand and the socialists on the other do not want to represent or explain things, respectively, as they are; rather, they chase after practical purposes and the first [i.e. Bastiat] wants to *justify the facts* (that is no scientific problem). The latter present them as glaring injustices; hence their falsification of the facts, to say nothing of their laws! Bastiat wants to fuse together the fundamentally different views [*Anschauungen*] of ‘fact’ and ‘law,’ ‘that

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<sup>281</sup> Ibid., 289, n. 158; *Investigations*, 236, n. 158.

<sup>282</sup> Grimmer-Solem, *Rise of Historical Economics*, 277-278.

<sup>283</sup> Kauder, ed., *Carl Mengers Zusätze*, 6; 5.



which is' and 'that which should be.' That is a false method (socialists of the chair and free traders in Germany!).”<sup>284</sup>

Claims to “moral” science or to the direct support for particular moral-political doctrines were thus baseless in Menger’s view, and involved several related confusions. The most important of these confusions were those between Is and Ought (“‘that which is’ and ‘that which should be’”) and, above all, between theory and practice. Here too the difference between Menger and Schmoller was not that Menger rejected the importance of questions of practice in economics, any more than he rejected the use of history, or empiricism. It was, rather, that he objected to the historical economists’ tendency to mix practical questions together with theory and to refuse to differentiate them from it. Menger was sensitized to such problems in the case of the theory/practice distinction already in the early 1870s. The few methodological remarks in the preface to the *Grundsätze* contained a warning against mistaking the subject matter appropriate to economic theory: it was not rules for practical activity but the *conditions* under which such activity will take place in providing for human wants.<sup>285</sup> He took note of what he described as Rossi’s strictures “against ethical admixtures” and “commingling politics with *pure economics*,” as well as the Italian’s clear distinction between “Econ. pol. rationelle (pure) et. Ec. pol. appliquée.”<sup>286</sup> A quotation he copied out in full from Rossi sheds light on his subsequent concerns over the historical economists’ confusion of history with theory, and theory with practice, in the attempt to consider all questions as part of one single scholarly activity: “Nous ne

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<sup>284</sup> Ibid., 9. To which he added the ultimate insult: “Bastiat is a lawyer.”

<sup>285</sup> Menger, *Grundsätze*, ix; *Principles*, 48.

<sup>286</sup> Kauder, ed., *Carl Mengers Zusätze*, 4; 7; 5. In another passage within the pages Menger read, though one he did not quote directly, Rossi stated that political economy, morals, and politics “se touchent, mais ne se confondent pas,” *Cours d’économie politique*, 16 (that is, these fields abut but are not to be confused with each other).

croyons pas que ce soit un moyen d'apporter la lumière que de supprimer l'analyse et de faire de toutes les sciences morales et politiques un pêle-mêle [etc.].”<sup>287</sup>

In the 1880s, this “pêle-mêle” formed the central complaint Menger made about economics under the hegemony of the historical-ethical school: the latter called for a “*universal science of the economy*” which would “reject separation [of the various areas of economics] in presentation [*Darstellung*], although such a separation would in no way destroy the inner coherence of each. They even stigmatize this separation as a step backward, as ‘an unnatural dismemberment of an intrinsically coherent material.’”<sup>288</sup> In fact, it was the mixing together of several quite separate scientific activities that was regressive. “Just as great an error concerning the nature of theoretical economics and its position in the sphere of social sciences [as that of confusing theory with history] is perpetrated by those who confuse it with *economic policy*, who confuse the science of the general nature and connection of economic phenomena with the science of the maxims for the practical direction and advancement of economy,” Menger wrote. Much like Nassau Senior and Cairnes among the English economists, he suggested that this was analogous to identifying chemistry with chemical technology, or physiology and anatomy with therapy and surgery: a confusion so basic that it was difficult to understand its persistence.<sup>289</sup> Probably it was a function of the undeveloped state of economics as a science: “Theoretical knowledge has everywhere developed only gradually from practical judgments and with the growing need for a deeper scientific substantiation of practice. Theoretical knowledge in the field of economy has also taken this course of development. It, too, had originally only the character

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<sup>287</sup> Ibid., 5.

<sup>288</sup> Menger, “Grundzüge,” 192-193; “Systematic Classification,” 7. See further his insistence that it was this confusion, which explicitly included that between theory and practice, that set Menger apart from the historical-ethical school, and not “the use of history and statistics as foundational ancillary sciences”: “Grundzüge,” 193; “Systematic Classification,” 8.

<sup>289</sup> Menger, *Untersuchungen*, 19; *Investigations*, 46.

of an occasional motivating of practical maxims, and by nature there still adhere to it traces of this origin and of its previous subordination to economic policy.”<sup>290</sup> The other more developed (natural) sciences, too, had followed this path and turned from it in their growing maturity, as economics still needed to do.<sup>291</sup> The only impediment to economics’ achievement of maturity as a science was in fact the historical-ethical school’s “error” in “regarding the union of economic theory and applied economics, rather than their separation, as progress and even as a methodological postulate. Actually, our efforts should be directed towards furthering the separate treatment of the theoretical and the practical, since this is of the greatest importance for the development of our science.”<sup>292</sup>

What, then, would a properly disentangled view of theory and practice involve? For Menger, it certainly did not involve the rejection of practical concerns as matters for scientific consideration, and there was no suggestion that science was a matter of pure theory. “I would especially like to hold that all the sciences, whether they be theoretical or practical, exhibit the same status—the latter no less than the former,” he insisted against Schmoller in his 1884 polemic.<sup>293</sup> The notion of a practical science was a perfectly legitimate one; indeed, it formed the final division of Menger’s taxonomy of the sciences in addition to the individualizing and generalizing sciences we have examined.<sup>294</sup> The practical sciences were no mere “cookbooks” or collections of “recipes,” as some of the historical economists he opposed had suggested—simply heaps of advice on specific topics.<sup>295</sup> Nor were they theoretical sciences *manquées*, simply

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<sup>290</sup> Ibid., 20; *Investigations*, 46-47. See also Anhang (Appendix) III generally.

<sup>291</sup> Menger, “Grundzüge,” 194; “Systematic Classification,” 9.

<sup>292</sup> Ibid., 194/9; see also *Untersuchungen*, 21, 94-95; *Investigations*, 47, 98-99, on the mistake of believing that there could be a single universal “method” to accomplish both tasks and the need for a “strict separation.”

<sup>293</sup> Menger, *Die Irrthümer des Historismus in der deutschen Nationalökonomie* (Vienna: Hölder, 1884), 56. As has often been remarked, this polemic has little substantive content and adds nothing to the *Untersuchungen*.

<sup>294</sup> E.g., *Untersuchungen*, 7-10; *Investigations*, 38-40; “Grundzüge,” 199-200; “Systematic Classification,” 14.

<sup>295</sup> Menger, “Grundzüge,” 202; “Systematic Classification,” 17.

waiting for greater rigor.<sup>296</sup> Instead, the task of the practical division of economic science was to “research and present the principles of purposeful action [*zum zweckmässigen Handeln*], for purposeful intervention in events [*Erscheinungen*: also, ‘phenomena’]” as the specific conditions of the case required.<sup>297</sup> Or, as he had put it in the *Untersuchungen*, “The *practical economic sciences* finally are supposed to instruct us on the basic principles according to which the economic designs of people (according to conditions) can be most suitably fulfilled,” and included the divisions of economic policy for collective national purposes, and of the science of finance and the science of private economy for individual actors (but including governments in the former category).<sup>298</sup> In order to fulfill this role, the practical sciences necessarily depended on the guidance of the theoretical sciences in identifying the factual constraints that would be faced in the pursuit of particular purposes, to the extent that Menger could write that the theoretical branch “forms the basis of practical sciences.”<sup>299</sup> He observed that practical sub-disciplines within economics, like other practical sciences, did not depend just on *economic* theory, but on the results of multiple theoretical disciplines; however, it was clear that economic theory provided the main foundation.<sup>300</sup>

Menger was not a Kantian, and it has been suggested that the distinction between Is and Ought, far from being at the center of his commitment to value-freedom, was rejected by him.<sup>301</sup> Nonetheless, Menger did draw the distinction between Is and Ought, positive and normative, and he connected it with his distinction between theory and practice. Near the beginning of the

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<sup>296</sup> Menger, *Irrthümer*, Eleventh Letter passim.

<sup>297</sup> Ibid., 57. The word “*zweckmässig*” used in both cases here connotes not just purposive action but action directed appropriately towards fulfilling purposes.

<sup>298</sup> Menger, *Untersuchungen*, 255-256; *Investigations*, 210-11.

<sup>299</sup> Ibid., 26, 257; *Investigations*, 51, 212; *Irrthümer*, 58.

<sup>300</sup> Ibid., 256-257 n.143; *Investigations*, 211 n.143.

<sup>301</sup> Nau, “Zwei Ökonomien,” 24. At four paragraphs, this is the longest discussion of Menger’s views on value-freedom in the literature. However, Nau’s equation of value-freedom with a positivistic perspective and claim that Menger rejected the distinction between *Sein* and *Sollen* vitiate the discussion in this important survey.

*Untersuchungen*, he identified the difference between the practical sciences and their historical and theoretical counterparts as one of positive and normative claims. The “nature” of practical sciences “is essentially different” from the other two branches in that “sciences of this type do not make us aware of phenomena, either from the historical point of view or from the theoretical; they do not at all teach us what *is*. Their task is rather to determine the basic principles by which, according to the diversity of conditions, efforts of a definite kind can be most suitably pursued. They teach us what *should* be, according to the conditions, for definite human aims to be achieved.”<sup>302</sup> He also credited Roscher with drawing the Is/Ought distinction (although in a way that does not proceed to contrast practice with theory along Menger’s lines), and called attention to the mistakes that can arise in separating theory and practice when a single term, such as “law,” contains both normative and positive uses that become confused in scholars’ presentations.<sup>303</sup> H.H. Nau’s interpretation, that Menger rejected the distinction between Is and Ought, is based upon a specific comment Menger made in response to the position represented by Brentano, which we analyzed above.<sup>304</sup> Menger was concerned by the historical economists’ treatment of the practical sciences as mere catalogues of predetermined, abstract prescriptions that failed to take individual nations’ circumstances into account. The argument he represented as the reason for their rejection of the practical sciences was that “[i]t is the task of science to be concerned solely with the *Is* and not with the *Ought*. Science has to teach us what *was*, what *is*, and how it

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<sup>302</sup> Menger, *Untersuchungen*, 7; *Investigations*, 38.

<sup>303</sup> *Ibid.*, 96; *Investigations*, 99.

<sup>304</sup> Brentano had not yet published the essay we discussed above at the time of Menger’s writing in 1889, but his general position was known to Menger on the basis of his 1889 inaugural lecture at Leipzig, which Menger cites. Strictly speaking, Menger does not name any particular historical economist in this passage, leaving the attribution vague. However, he considers Brentano’s views at some length in the following sections, and none of the other historical economists had—to my knowledge—adopted the Is/Ought distinction as a means of rejecting “Manchesterite” prescriptions for the economy.

*has come to be*, but not what *ought* to be.”<sup>305</sup> That is, in his description of this view, the appropriate task of economics in general was to offer “a mere description of what was and what is, i.e. by ‘economic history and especially a record of the outcome of the attempts that have hitherto been made to improve economic conditions.’”<sup>306</sup> This was Brentano’s position, employing the distinction between Is and Ought to rule out the traditional, theory-based laissez-faire prescriptions, while suggesting that a neutral historical description of what *was* done in the past could yield the obvious conclusions for proper social policy today, thereby unsubtly smuggling an Ought back in. Menger responded that the practical sciences had a separate function and separate cognitive goals from the historical and theoretical sciences, and that they could never rely entirely on past experience to serve their function.<sup>307</sup> Clearly, this was not a rejection of the validity of the distinction between Is and Ought, but only a dismissal of the idea that discussion of past experience would suffice for providing practical guidance in the ever-changing present.<sup>308</sup> Indeed, Menger clarified his statement in a footnote, which contains the most concise treatment of his position on value-freedom in all of his methodological work:

In view of what has been said above, it is hardly necessary to observe that the applied sciences do not force upon us any *absolute Ought*, but that they only teach us the way in which certain generally determined ends can be attained in the light of our judgment at a particular time and *insofar as we want to attain them at all*. The applied sciences do not contain...a command to pursue any aims in particular. They merely show us how we have to act (or, if one will, how we *ought* to act!), on the basis of our judgment at a particular time, if we *want* to attain a given end; whereas it is the historical, the morphological, and the theoretical sciences that provide us with knowledge of the past and the present and of the nature of phenomena and their interrelations.

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<sup>305</sup> Menger, “Grundzüge,” 206; “Systematic Classification,” 20. Note that the original English translation wrongly replaces “Is” and “Ought” (*Sein* and *Sollen*) with “fact” and “value,” terms which Menger does not use here.

<sup>306</sup> Ibid., 207; “Systematic Classification,” 21.

<sup>307</sup> Ibid., 207; “Systematic Classification,” 21-22.

<sup>308</sup> Ibid., 208; “Systematic Classification,” 22.

It was *this* set of tasks, he concluded, which were entailed by the statement that the practical sciences “do not teach an Is but an Ought.”<sup>309</sup>

We have thus arrived via the theory/practice and Is/Ought distinctions at the limits, for Menger, of what social science can achieve in considering human values and actions based upon them. Menger did not provide as comprehensive an account of the possible areas of non-normative scientific analysis of values as Weber and others later would; he did not, for instance, point out that social scientists could well assess the internal consistency of particular value systems or the coherence of programs of action built upon them. His focus was instead on the quintessential economic task of determining the most appropriate means to given ends. This could and must be done situationally,<sup>310</sup> for although he implied that a given goal generally had one most “suitable” (or most “economical”) road to its attainment, this could not be prescribed concretely in advance by the practical sciences, and of course the usual impediments of error, volition and other influences must be acknowledged as operative to some degree in concrete situations.<sup>311</sup> It is important to observe, however, that his commitment to the theory/practice and Is/Ought distinctions alone could not deliver Menger to this position supportive of “value-free” social science, addressing values from the perspective of “instrumental” or means-ends rationality. By themselves, either could have been merely a procedural injunction not to mix two legitimate tasks, and coupled with a purportedly objective ethical theory would not have required Menger to reject the idea of a normative science. The hidden premise was and must have been his value subjectivism: although he did not make it explicit in his arguments about the appropriate tasks of the practical sciences, only the subjectivist premise can explain why practical goals and other “Oughts” must be treated as givens.

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<sup>309</sup> Ibid., 206 n.1; “Systematic Classification,” 36, n. 16. Note that the emphasis is Menger’s.

<sup>310</sup> Ibid., 216 n.1; “Systematic Classification,” 38 n.27.

<sup>311</sup> Menger, *Untersuchungen*, 264; *Investigations*, 217-18.

Let us recapitulate once more. We have shown that according to Menger, social science recognized the necessity of taking human values and goals, seen as rationally groundless and “arbitrarily” willed, as basic data for analysis alongside the external reality of actions, events, and institutions. To gain objective knowledge while still taking these data into account, these non-rational, “arbitrary” elements were to be treated as prerequisites or givens for subsequent analysis. Within the theoretical sciences, these elements served as the parameters of any empirical complex of actions or institutions to be explained by theory; and within the practical sciences they served as the “ends” for which the practical sciences were to provide guidance about the proper “means”—through the use of the full range of relevant findings of the theoretical sciences—for the concrete situation being analyzed. While Menger had thereby explained how the practical sciences can legitimately avoid “contamination” by subjectivity, *provided that they can rely on objective guidance from the theoretical sciences*, it remains to be seen how he could guarantee the *latter sciences*’ objectivity. Explanations of empirical reality by the theoretical sciences were only as objective as the theory itself, after all, and consequently the attempt to limit the subjective element to setting the parameters of the *explanandum* presupposed that such subjective elements had *not* entered into the origin of the theory or *explanans*. We return therefore to the question of how theory arose for Menger (which we saw could not be inductive), and how he vouched for its objectivity. Without such a guarantee, his “value-free” science commitment would remain at the level of a disambiguation of scientific tasks (into theory and practice) rather than a full theory of scientific knowledge.

This was the form in which Menger faced the objectivity problem confronted by all the value-freedom advocates in their attempt to domesticate human subjectivity for the house of science.



The following pages conclude our examination of Menger with a critical treatment of the ways in which his response could be formulated and defended.

Menger did not use the word “objectivity” or its cognates to address this issue, but he did offer a justification of the *certainty* of theoretical economics, and by extension social science generally. As we saw in the previous section, Menger suggested that *theory* avoided arbitrariness in considering the complex world by focusing on the recurrent forms in which phenomena appeared—quite definitely including subjective phenomena like the valuation of goods. One could select features deemed important by virtue of the use of types, which would call attention to these recurrent general features or forms. The claim to non-arbitrariness, and to certainty in the case of exact types, here obviously lay in the justification of the criterion by which such features were selected out of reality by the social scientist, and thus could be formulated as the question: what ensured the objectivity, or in Menger’s terms the certainty, of types?

Menger had several possible options, and because he nowhere positively states his choice among these options we must eliminate two of them to focus on his answer. First, his types could make their claim to certainty on the basis of *a priori* necessity. A later Austrian economist strongly influenced by Menger and Weber, Ludwig von Mises, would become famous (or notorious) for taking this path: Mises’ science of human action, or “praxeology,” which he identified with economic theory, took as its starting point axiomatic claims about human action that were said to be the transcendental conditions for the possibility of knowledge of any action. The propositions of economic theory followed deductively, and consequently with certainty, from these necessary axioms, with no necessary reference to experience of the empirical

world.<sup>312</sup> Menger could have taken his exact types as axiomatic and necessary for the possibility of economic action, and thus justified the objectivity of economic theory deriving from them through deduction.<sup>313</sup> But Menger emphatically rejected *a priorism*—the “mistakes of aprioristic social philosophy,” as he referred to it, or the “aprioristic speculation in the sciences that have the real world for their object” from which we have rightly been “liberated” by the historicists.<sup>314</sup> Even Menger’s exact theory relied on experience—on empiricism—and was not therefore *a priori*.<sup>315</sup> Besides, the *a priori* strategy in this form (in which *a priori* truths are purely analytic, or mere tautologous definitions) faced the more or less insuperable difficulty of bridging the necessary and certain thought-world of axiomatic deductions and the real world of experience, a problem that rendered Mises’ theory of action more or less a curiosity.<sup>316</sup> If they were not *a priori*, Menger could have regarded his types simply as heuristic devices designed to allow the scholar to determine the course of actual divergences from an ideal or model, as Weber’s types were, and not as a form of knowledge at all. But no one has interpreted Menger as taking this approach either, and for good reason, as there is no textual basis for it.

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<sup>312</sup> The extensive and often inadequate literature on Mises is not directly relevant to this discussion; for consideration of Mises’ *a priorism* in partial connection with Menger’s, see Oakley, *Foundations of Austrian Economics*, 188-190, although note that Oakley advances a quasi-Aristotelian reading of Mises to supplement this broadly neo-Kantian reading.

<sup>313</sup> This appears to be Schmoller’s interpretation of Menger’s approach: Schmoller, “Methodologie der Staats- und Sozialwissenschaften,” 280.

<sup>314</sup> Menger, “Grundzüge,” 188, 206; “Systematic Classification,” 2, 21. See also Menger, *Untersuchungen*, 6-7 n.4; *Investigations*, 37n.4.

<sup>315</sup> Menger, “Zur Kritik der politischen Oekonomie,” 126n.4. See Menger’s clarification here of his terms “empirical” and “exact,” and insistence that these designations did *not* signify that the latter was unempirical, and that they differed in their “goals of knowledge” and not their “paths of knowledge,” both relying on experience for the latter. Bostaph, “Methodological Debate,” 12, is quite correct that Menger was not an apriorist.

<sup>316</sup> Barry Smith (“Aristotle, Menger, Mises,” 275-77, *Austrian Philosophy*, 305ff.) and Allen Oakley (*Foundations of Austrian Economics*, 42) have seen Menger as an apriorist who rejects the equation of the *a priori* with the analytic, holding open the possibility of a synthetic *a priori* along Aristotelian lines and thereby bridging thought and experience. They acknowledge that Menger saw the origins of exact types as empirical, even if they could be known through only *one* experience (rather than through induction). But I confess that I cannot see how this is reconcilable with the claim that Menger was an apriorist: one experience is still experience, and *a priori* truths are logically prior to experience. Uskali Mäki, “Universals and the *Methodenstreit*,” 490, would appear to agree.

Instead, Menger suggested that types and typical relations constituted real knowledge of the world gained empirically but not inductively<sup>317</sup>: he refers to types of both kinds as “knowledge of empirical forms,” and his discussion of them is predicated on the assumption that human beings could know them in an immediate and commonsense way.<sup>318</sup> As Max Alter and others have noted, this apparently baseless assertion can be interpreted more “charitably” when we recognize that unlike so many other modern thinkers, Menger was a philosophical realist.<sup>319</sup> That is, Menger regarded essences as really inhering in things rather than as being mere “names” or designations supplied by conceptual thought (as posited by philosophical nominalism); in this case, the essence of a particular economic phenomenon such as the rate of interest could simply be “read off” of any particular experience of it, since all instances of the phenomenon must exemplify its essential form. On this line of thinking, types were not arbitrary concepts *deployed* by the social scientist for understanding reality, because they were not concepts at all: they were the real essences inhering in things. As Menger wrote, “Theoretical economics has the task of investigating the *general nature* and the *general connection* of economic phenomena, not of analyzing economic *concepts* and of drawing the logical conclusions resulting from this analysis.

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<sup>317</sup> For a very early instance of this viewpoint, dating to 1867, see the marginal note Menger made in K.H. Rau’s *Grundsätze der Volkswirtschaftslehre*, published in mimeograph as: Menger, *Carl Mengers Erster Entwurf zu seinem Hauptwerk ‘Grundsätze’: Geschrieben als Anmerkungen zu den ‘Grundsätzen der Volkswirtschaftslehre’ von Karl Heinrich Rau* (Tokyo: Library of Hitotsubashi University, 1963), 16.

<sup>318</sup> Menger, *Untersuchungen*, 5; *Investigations*, 36, and *passim*.

<sup>319</sup> Alter, *Carl Menger*, 92. Menger did not discuss his basic philosophical stance, but it has been the subject of much research. The reasons for thinking that Menger was a realist owe to his apparent Aristotelianism, as documented by numerous scholars: Kauder, “Intellectual and Political Roots of the Older Austrian School,” *Zeitschrift für Nationalökonomie* 17:4 (1958), 411-425, esp. 414-15; Smith, “Aristotle, Menger, Mises,” 265-279; Alter, *Carl Menger*, 93-95, 112-121; Campagnolo’s investigation of Menger’s reading of Aristotle based on archival evidence concentrates on economics rather than on the methodological or epistemological questions relevant here, in part because Menger’s copies of the relevant works of Aristotle are missing: Campagnolo, *Criticisms of Classical Political Economy*, 236-47, 250-53.

The phenomena, or certain aspects of them, and not their linguistic image, the concepts, are the object of theoretical research in the field of economy.”<sup>320</sup>

There was not necessarily anything mystical about the idea: Menger’s realism was not of the Platonic kind that posited an eternal world of forms, but an immanent realism: essences were instantiated in real things, and only in real things, in the Aristotelian manner of a form given to matter.<sup>321</sup> Uskali Mäki has presented a persuasive, textually supported case for viewing Menger’s theory of exact types as a realist theory of universals, i.e., essential properties inhering in particulars and only in particulars, without any independent existence. For instance, in the case of *homo economicus*: when taken as a universal, this type could not exist outside of real human individuals, but within them it was also one really existing “aspect” among many. It could be *thought* of separately, through abstraction, but could never in fact appear in an isolated, pure form, and the thought of it was an instance of the universal rather than an imposed mental construct.<sup>322</sup> The realistic type in Menger’s writings could not be seen as strict universals owing to their particular elements, and Mäki suggests that they were instead generic instances of particulars.<sup>323</sup> The contrast with Weberian types is then apparent, as the latter are 1) not real; 2) conceptually imposed upon, rather than perceived in, reality; and 3) and designed instrumentally to show divergences between an ideal and a real particular, instead of constituting knowledge themselves.<sup>324</sup> Menger’s types did constitute such knowledge, and so, if the realist doctrine was

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<sup>320</sup> Menger, *Untersuchungen*, 6-7 n.4; *Investigations*, 37n.4, where he also specifically disputes the historical economists’ accusation that theorists play with arbitrarily determined concepts.

<sup>321</sup> Mäki, “Universals and the *Methodenstreit*,” 485.

<sup>322</sup> *Ibid.*, 485-486.

<sup>323</sup> Mäki’s example will clarify this statement: “Think of money. This particular penny and the cheque book in my pocket now belong to the category of money. They are *particular* instances of money; they are money tokens. Coins in general, bank notes... [and so forth] are to be likewise categorized as money. But they are not money tokens; they may be called *generic* instances of money.” These real types “embody both the general features of money and some of its more specific manifestations (though the individual or unique features of money particulars have been put aside.” *Ibid.*, 479-480.

<sup>324</sup> *Ibid.*, 483.

true, Menger would seem to have avoided the potential criticism that his selection criterion was arbitrary.

However, quite apart from objections to realism from a nominalist perspective, such as how one really existing thing (the universal) could exist in multiple instances, there was nothing in realism itself to indicate that one could have incorrigible knowledge of essential properties like universals.<sup>325</sup> That is, even if there were in fact real essences which human beings could know, we could very well be mistaken in perceiving one, and the investigator's preferences and biases might well interfere in the process of gaining such knowledge. The way Menger attempted to head off this objection was to argue that exact theory "seeks to ascertain the *simplest elements* of everything real, elements which must be thought of as strictly typical just because they are the simplest."<sup>326</sup> Thus, we would know that we have reached knowledge of actual universals—properties which are "strictly typical" with no admixture of the particular to them—when we have traced all phenomena to the simplest elements of which they are composed. This analytic-compositive method, as it is sometimes called,<sup>327</sup> was the method Menger aimed to employ throughout his work; he wrote in the *Grundsätze* that "[w]e have endeavored to reduce the complex phenomena of human economic activity to the simplest elements that can still be subjected to accurate observation, to apply to these elements the measure corresponding to their nature, and constantly adhering to this measure, to investigate the manner in which the more complex economic phenomena evolve from their elements according to definite principles."<sup>328</sup>

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<sup>325</sup> As pointed out by Smith, "Aristotle, Menger, Mises," 276-277. Realism as a doctrine makes no claims about the possibility of infallibility or incorrigibility in perceptions of universals, only about their potential *intelligibility*.

<sup>326</sup> Menger, *Untersuchungen*, 40; *Investigations*, 60.

<sup>327</sup> E.g., Alter, *Carl Menger*, 91.

<sup>328</sup> Menger, *Grundsätze*, vii; *Principles*, 46-47; see also *Untersuchungen*, 40-43, 77-78, 115; *Investigations*, 60-62, 86, 112.

In Menger's work, this took the form of methodological individualism, and proved a very fruitful method in examining markets and institutions arising from unplanned human actions. But, fruitful or not, it hardly answered the challenge. First of all, it made no mention of realistic-empirical types, which were certainly not strictly typical; the assumption that they represented generic forms of particulars may help clarify their difference from exact types but obviously bears no guarantee of objectivity with it. This was a serious flaw, as these types allowed Menger to deal with many of the unavoidable complications introduced by subjectivity, uncertainty, time, error, and the other complications he rightly acknowledged as being important for social science to address. His methodological work simply contains no defense of the ability of scholars to discover such types objectively, and any use of realistic-empirical theory (in explanation or in practical guidance) is thereby subject to charges of subjectivity or bias. The exact approach itself employed the standard neoclassical idealized assumptions about full (relevant) information and self-interest in the case of economic man,<sup>329</sup> and if the realistic-empirical type was merely to be seen as a pragmatic stopgap with no objective grounding, Menger would need at least to have demonstrated some connection between his exact types and the "imperfect" elements of empirical reality for his "simplest elements" argument to salvage the realistic commitments of his economics. Precisely this connection was, however, never made.<sup>330</sup>

Second, even for exact types, the regress argument still threatens: precisely how do we know we have reached the "simplest elements"? Is the self-interested economizing individual really the simplest element to which conduct can be reduced or does the universal lie somewhere deeper? And how would we assess an alternative answer? We cannot test our exact theories based on such types against social reality because the latter is too complicated, involving the

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<sup>329</sup> Mäki, "Universals and the *Methodenstreit*," 480.

<sup>330</sup> On this issue, see Jack Birner, "A Roundabout Solution to a Fundamental Problem in Menger's Methodology and Beyond," in Caldwell, ed., *Carl Menger and His Legacy in Economics*, 241-61, here 250-252.

interplay of countless other types and typical relations which are not yet known and perhaps never will be.<sup>331</sup> In the meantime, before all of the other exact sciences are developed to perfection, it will not be possible to test any one exact theory in any way, and we are left only with subjective conviction that we have truly discovered the universal properties or laws in question. Multiple interpretations of the same events would prove possible.<sup>332</sup> Moreover, it is not even clear that Menger is correct in thinking that the “simplest elements,” even if discovered, would necessarily be “strictly typical” or universal in the first place. Max Alter’s equation of the theory of knowledge in Aristotelian realism with Romantic-era hermeneutics, and the attempt to view Menger’s method as one of purely intuitive *Verstehen*, is not persuasive, but his argument that Menger failed to give sufficient reasons why his procedure amounted to more than introspection, operationally speaking at least, is acute.<sup>333</sup>

Finally, Menger’s attempt to finesse the problem of lawful knowledge of free-willed human agents—by locating the effects of willed action only at the level of the parameters for the explanation of a particular case—is not successful. For the willfulness of human beings posed a challenge not only to scientific determination of ultimate ends, but also had an impact on their decisions about means in a way that rendered their activities fundamentally unpredictable and made the attempt to equate teleological connections (ends/means analysis) with causal connections invalid.<sup>334</sup> Menger attempted to defuse this objection by acknowledging that real

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<sup>331</sup> Menger, *Untersuchungen*, 54; *Investigations*, 69-70.

<sup>332</sup> See Oakley, *Foundations of Austrian Economics*, 81, for a critique of Menger’s claim to have discerned that “strictly typical” phenomena, once observed, must always occur under exactly the same conditions on any future occasion (e.g., strictly typical A and B are always followed by strictly typical C, once observed); Menger’s logic ignores that without omniscient perception of conditions, unobserved phenomenon Z might also be required for the causal connection, or that the same result C might be the result of X and Y unrelated to A and B.

<sup>333</sup> Alter, “What Do We Know About Menger?” in Caldwell, ed., *Carl Menger and His Legacy in Economics*, 313-348, here 331-32; Alter, *Carl Menger*, 23-65, 97-99.

<sup>334</sup> Menger’s lifelong struggle with the relations between these two modes of thinking was reflected already in his attempts to conceive teleological connections as depending on causal connections in the 1860s and 1870s: see *Carl Mengers Zusätze*, 46; *Carl Mengers Erster Entwurf*, 5; he later decided in favor of the independence of teleology:

agents make errors, do not always act rationally to attain the best satisfaction of their needs, and can be creative in their responses, and then suggesting that to fault exact theory for not taking these deviations into account was analogous to faulting the exact natural sciences for ignoring the real impurity of what they modeled as “pure gold, pure hydrogen and oxygen,” and so forth.<sup>335</sup> But this was not an appropriate analogy, as Oakley has pointed out, since in the natural examples the “impurities” were still the result of determinate physical laws, even if they were difficult to measure, while in the social sciences, the assumption of free will broke with causal determination on principle and not just at the level of practical measurement.<sup>336</sup> Human subjectivity prevented not just the prediction of particular empirically given cases, but the construction of a completely certain exact theory in the first place.

With exact theory thus vitiated, and with realistic-empirical theory ungrounded as to its objectivity, Menger was left without a successful solution to the objectivity problem. His attempt to take subjective values into account while preserving the objectivity of social scientific knowledge was a major attempt to mediate between the historicist and positivist scientific traditions, and he was perhaps the first German-language economist to couple the doctrines of value subjectivism and value-freedom together in rejecting the idea of a normative science. But he could not explain how the positive science with which he was left could generate results with universal validity.

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Kiichiro Yagi, “Carl Menger and Historicism in Economics,” in Yagi, *Austrian and German Economic Thought*, 51-52.

<sup>335</sup> Menger, *Untersuchungen*, 76-77, 259-61; *Investigations*, 85-86, 214-15.

<sup>336</sup> Oakley, *Foundations of Austrian Economics*, 71.



### Chapter 3.

#### Ferdinand Tönnies on the Subjectivity of Values and “Value-Free” Science

On the morning of October 20th, 1910, Ferdinand Tönnies (1855-1936) gave the opening lecture at the first meeting of the Deutsche Gesellschaft für Soziologie—the German Sociological Society. The delegates had informally assembled the evening before to hear a talk by another member of the DGS executive board, Georg Simmel, but Tönnies, as president of the new organization, had agreed to provide an official, programmatic statement to start the first session. He fully intended to strike an irenic tone. The gathering included academics from many fields—economists, statisticians, historians, jurists, theologians, philosophers, anthropologists, and health specialists—and inevitably they had differing ideas about the nature of the new discipline of sociology.<sup>1</sup> Tönnies attempted to do justice to this diversity of views, and with one exception he avoided excluding particular approaches. The exception, however, was telling: the Society was not to accept investigations intended to further a normative or political agenda. Whatever previous scholars may have done, “*We* leave all programs of the future, all social and political tasks, out of play,” remarked Tönnies. “Not because we despise them, but rather in consistency with scientific thought, because we note the difficulties of basing such ideas scientifically and for the time being consider them unconquerable; and because we also expect from those who have other opinions on this, for instance those representing ‘scientific socialism,’ that they will accept our setting the domain of sociology outside such controversial matters [*Streitfragen*] and demarcating it from them, in order to limit ourselves to the much more easily resolvable task of the *objective knowledge of facts*.” Perfect objectivity was doubtless

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<sup>1</sup> For a list of the 27 attendees, see Dirk Käsler, *Die frühe deutsche Soziologie, 1909-1934, und ihre Entstehungsmilieus* (Opladen: Westdeutscher Verlag, 1984), 603.

unattainable, he added, but this did not invalidate the effort to be more objective rather than less. And at any rate, it was no business of the scholar to argue for one social policy rather than another: “As sociologists, we want to be concerned only with what *is*, not with what according to any particular viewpoint, on any particular grounds, *should be*.”<sup>2</sup>

Here Tönnies stood foursquare with his brilliant and quarrelsome younger contemporary, Max Weber. It has long been conventional wisdom that the DGS was founded as a result of the so-called *Werturteilsstreit* or value judgment controversy sparked by Weber. In his disappointment with the tendentiously political scholarship furthered by the Verein für Sozialpolitik, argued his widow and biographer Marianne in 1926, Weber had agreed with a number of his contemporaries on the desirability of founding a new organization which would further the purely scientific study of modern social problems without adding an “ethical-political emphasis.”<sup>3</sup> This interpretation has been challenged as misrepresenting the importance both of Weber and of the specific issue of freedom from value judgments; Otthein Rammstedt has pointed out that the DGS was founded *before* the official outbreak of the *Werturteilsstreit* later in 1909, that its initial bylaws contained no mention of the postulate of value-freedom, which was added some months later without debate, and that other social scientists who were less engaged by the principle of value-free science were instrumental in its founding.<sup>4</sup> Whether or not this is

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<sup>2</sup> Ferdinand Tönnies, “Wege und Ziele der Soziologie,” in *SSK II*, 130. Problematically translated in Christopher Adair-Toteff, ed., *Sociological Beginnings: The First Conference of the German Society for Sociology* (Liverpool: Liverpool University Press, 2005), 62. Here as elsewhere in this chapter, I will cite the German original followed by any existing English translation. Because the translations are of quite variable quality (in the present case, for instance, the translator twice confuses “Ansicht” with “Absicht”), I will alter them in accordance with the original where necessary, and will do so without further notice. In ambivalent cases, or to ensure clarity, German words will be provided, in square brackets.

<sup>3</sup> Marianne Weber, *Max Weber: A Biography*, trans. Harry Zohn (New Brunswick, NJ: Transaction, [1926] 1988), 420.

<sup>4</sup> Otthein Rammstedt, “Die Frage der Wertfreiheit und die Gründung der Deutschen Gesellschaft für Soziologie,” in Lars Clausen and Carsten Schlüter, eds., *Hundert Jahre “Gemeinschaft und Gesellschaft.” Ferdinand Tönnies in der internationalen Diskussion* (Opladen: Leske & Budrich, 1991), 549-560.

so, here it is enough to point out that Tönnies, at least, shared Weber's commitment to the DGS as a forum for value-free science.

He did so not out of mere conciliation or compromise, but out of conviction, and he repeatedly entered the lists on behalf of the principle. In 1914, for instance, he wrote to the DGS committee to oppose the inclusion of eugenics or the study of "racial hygiene" among the topics to be considered by the sociobiological subsection being organized by Alfred Grotjahn, stating in no uncertain terms that according to the Society's principles, "Only theoretical-objective researches into facts, causes and effects may be considered, with the exclusion of value judgments and ideas about breeding [*Züchtungsgedanken*]." <sup>5</sup> And many years later, as the DGS was undergoing its "*Gleichschaltung*" at the hands of the Nazis, Tönnies referred once more to his duty to uphold the principles established in that first meeting: "I affiliated myself in the year 1910 with the precept of the exclusion of value judgments from our science enunciated especially by Messrs. Max Weber and Werner Sombart—with the explicit interpretation that without deciding the question of whether practical theories are scientifically possible in this area, especially as ethics and politics, we would in any case exclude these from the realm of our activity. I have considered myself duty-bound to conduct myself according to this guideline...." <sup>6</sup>

Tönnies is today better known as a sociologist than is one of the men he mentions as instrumental in establishing the principle of value-freedom—Werner Sombart—but he has drawn less interest and attention than Weber or Simmel among those regarded as founding members of the profession in Germany. For the most part, he is known as the author of *Gemeinschaft und Gesellschaft* (1887), a book more often mentioned than read, and for the distinction between pre-modern "community" and modern market "society" contained in its title. Sociologists may be

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<sup>5</sup> Tönnies to DGS Vorstand, circular letter of 3 March 1914. GStA PK, Berlin. VI. HA, NL Sombart, Nr. 18b.

<sup>6</sup> Tönnies, "Erklärung," 27 December 1933. Schleswig-Holsteinische Landesbibliothek, Kiel: Cb. 54, NL Tönnies B 30.9.

aware of Tönnies' extensive empirical and statistical studies, especially on criminology and prisons, and of his role in supporting such studies in their early stages. But the small wave of Tönnies scholarship that began in the early 1970s and lasted for the following quarter century failed to make this so-called "Nestor" of German sociology into the object of an international cottage industry like that which has grown up around his peers.<sup>7</sup> There has been notably little work done on Tönnies in English during the past fifty years: one book, a few book chapters and articles, as well as translations of two of Tönnies' own books and two volumes of selections from his work make up the entire corpus for the non-German reader.<sup>8</sup> Naturally the German-language study of Tönnies has advanced much further, with several volumes of conference papers and three monographs produced during the 1980s and 1990s, while slow progress has been made on a Tönnies *Gesamtausgabe* since 1998, and a mediocre biography was published in 2005. Far and away the most attention, even in the more recent scholarship, has been devoted to the origins of his theory of *Gemeinschaft* and *Gesellschaft*. Relatively little has been written about Tönnies' theory of science or methodology, apart from brief observations about the similarities between Tönnies' and Weber's use of heuristic models or ideal types. And no one has explained why Tönnies stood with Weber and Sombart in the value judgment dispute.

Indeed, the few scholars to comment on Tönnies' views on value-freedom have generally attempted to argue that he *opposed* it as a doctrine. Sibylle Tönnies, a descendent and professor

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<sup>7</sup> For a short account of the reception of Tönnies following his death in 1936, see Lars Clausen, "The European Revival of Tönnies," in Cornelius Bickel and Lars Clausen, *Tönnies in Toronto* (Kiel: Institut für Soziologie, 1998), 1-16. Though documenting the institutions in Kiel that have supported research on Tönnies, this paper unintentionally shows the relatively limited range of interest in his work.

<sup>8</sup> For English-language secondary literature, see Werner Cahnman, ed., *Ferdinand Tönnies: A New Evaluation* (Leiden: Brill, 1973); Arthur Mitzman, *Sociology and Estrangement: Three Sociologists of Imperial Germany* (New Brunswick, N.J.: Transaction, [1973] 1987), Part II; Harry Liebersohn, *Fate and Utopia in German Sociology, 1879-1923* (Cambridge: MIT Press, 1988), Ch.2; Klaus Heberle, ed. *Ferdinand Tönnies in USA: Recent Analyses by American Scholars*, Ferdinand Tönnies Arbeitsstelle Materialien Vol. 7 (Hamburg: Rolf Fechner Verlag, 1989); and Christopher Adair-Toteff, "Ferdinand Tönnies: Utopian Visionary," *Sociological Theory* 13:1 (1995), 58-65. The last two titles are uneven at best.

at Hamburg, writing in 1980 under the influence of the so-called “positivist dispute” between members of the Frankfurt School and the followers of Karl Popper, emphasized Tönnies’ commitment to rational natural law and his vigorously social-democratic political views in an attempt to clear him from the (apparently) nefarious charge of being a positivist. Equating the acceptance of the criterion of value-freedom with “positivism,” and equating positivism with “functionalism” and “conservatism,” she claimed that his rejection of the romantic conservatives of the early historical school of law, and their organic theories of society, *within* his scientific work combined with his well-documented *extra-academic* support of workers’ movements throughout his life to suggest that any statements he made about the exclusion of value judgments were mere window dressing. Tönnies was no “positivist”; he was a “partisan.”<sup>9</sup> But her claim about Tönnies’ commitment to natural law mistakes the particular role he accorded it, which did not involve the belief that natural law generated a real science of norms,<sup>10</sup> and her ahistorical treatment of “positivism” in no way proved that his rejection of certain early nineteenth-century theories could be seen as evidence for his being a supporter of partisan or “committed” science.

A much more substantive case was made by another descendent of Tönnies, Klaus Heberle, equally worried about salvaging Tönnies from the reputation of falling into “the nihilistic-relativistic trap of positivism.”<sup>11</sup> Heberle argued that his grandfather’s views differed from Weber’s in that they did not *originate* in reflections on the logical or epistemological problem of deriving knowledge of what “ought to be” from knowledge of what “is,” and that “Tönnies did not base his position on the proposition that ‘facts’ and ‘values’ are

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<sup>9</sup> Sibylle Tönnies, “Gemeinschaft oder Gesellschaft: Ein Werturteil?”, in Lars Clausen and Franz Urban Pappi, eds., *Ankunft bei Tönnies* (Kiel: Mühlen, 1981), 172-181, esp. 180.

<sup>10</sup> See below, Section III a).

<sup>11</sup> Klaus Heberle, “‘Science as a Vocation’ Revisited,” in Heberle, *Tönnies in USA*, 51-62, quotation on 51.

epistemologically absolutely heterogeneous.”<sup>12</sup> This is true: the Is/Ought distinction so important to southwest-German neo-Kantianism did not loom large in Tönnies’ convictions and was not his prime motive in accepting value-freedom.<sup>13</sup> Heberle justly points instead to Tönnies’ injunction that the social scientist learn to recognize the difference between what “is,” and what he “wants”: a psychological rather than epistemological question. And Heberle then draws from this second distinction the claim that it allows Tönnies to continue to maintain the possibility of a “critical” or “prescriptive” science, and that accurate, objective description of “what is” will *of itself* lead to “objective prescriptions for action.” Tönnies’ call to refrain from describing what ought to be, which we noted above in his 1910 lecture, is thus seen as a *temporary* injunction that exists only for practical reasons—rather than for lasting philosophical reasons—and may eventually be discarded in favor of a prescriptive science.<sup>14</sup> There is occasional evidence in Tönnies’ actual scholarly practice that would support this interpretation. And there are comments, such as the one from 1933 cited above, that remain open-ended as to the possibility of a scientific, normative ethics sometime in the distant future.<sup>15</sup> However, Tönnies was quite clear that no such possibility hovered on the horizon during his own day.

This chapter will contend, in fact, that a balanced view of Tönnies’ writings over the course of his career makes it difficult to hold that he envisioned the prospect of a “critical social science” as opposed to the *application* of scientific results in the solution of social problems, and that on the contrary his fundamental commitment to the subjectivity of values would have made

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<sup>12</sup> Ibid., 60.

<sup>13</sup> In this, Tönnies was not alone among advocates of value-freedom: see below, Ch. 4, on Hermann Kantorowicz.

<sup>14</sup> Heberle., 60-62.

<sup>15</sup> In particular, see Ferdinand Tönnies, “Selbstdarstellung,” in Raymund Schmidt, ed., *Die Philosophie der Gegenwart in Selbstdarstellungen* (Leipzig: Meiner, 1922), 226, in which Tönnies retrospectively distanced himself to some degree from the Weberian position and observed that he wanted to leave open the possibility of a future science of politics or ethics (presumably, from the context, a normative “science”). Although he suggested here in 1922 that his opening lecture was intended to represent the views of others in the DGS, his essays and letters between the 1880s and World War I are littered with similar statements, as we will see in Section III.

a truly prescriptive “science” impossible in any case. His position did indeed differ from Weber’s, but it was not just temporary prudential considerations that led the two to ally with each other. As we will see, Tönnies’ attachment to some form of the ideal of value-free science lasted throughout his life.

What follows fills part of the gap in scholarship on Tönnies’ theory of science by examining the sources and the nature of his views on values and value-freedom in scholarship, between his earliest writings and the First World War. Therefore it examines his substantive sociology only insofar as is necessary to this end. Pursuing our assumption that attitudes toward values and objectivity were conditioned by the life events and views on historical development of the “founders” of value-freedom, as well as by technical argumentation, we will explore in turn Tönnies’ activities both as a person and as a scholar, his account of modernity and its effects on values and norms, and those of his writings that have a direct bearing on methodological questions. This approach will allow us to understand why he took the stance he did on values in scholarship, and to assess what exactly value-freedom meant to him.

## **I. From Oldenswort to Kiel: Tönnies’ Life, Intellectual Development, and Career**

### **From 1855 to 1914**

Tönnies was born in 1855 in Oldenswort, a farming town on the Eiderstedt peninsula that juts out from the west coast of Schleswig-Holstein into the North Sea. It was and remains flat and windy cattle country, dotted with marshes and copses, villages and windmills running south to Hamburg and north past the islands of Pellworm and Sylt to Denmark. Tönnies’ father was a prosperous cattle farmer and church elder. The family had Dutch and Frisian roots and had been

successful landowners in the region since the eighteenth century. The farm on which Tönnies grew up, known as the Riep-Hof and purchased by the family in 1824, encompassed sixty hectares of good grazing and arable land, a few small gardens, and a sprawling straw-roofed farmhouse.<sup>16</sup>

It has been a commonplace among Tönnies scholars to observe that his upbringing and his family's rootedness in the world of Eiderstedt farm and village—centered on the rhythms of agriculture and local markets and church life—decisively marked his later portrayal of *Gemeinschaft* (community) in his major work, *Gemeinschaft und Gesellschaft*. That Tönnies had personal experience of traditional rural life and community, and that he loved his “homeland” in Eiderstedt and in Husum, where the family later moved, is unquestioned. During a very difficult period in the late 1890s, Tönnies wrote to his friend, the Danish philosopher Harald Høffding, that he had considered emigrating to England or America, but was dissuaded by his fierce devotion to the west coast of Schleswig, “my dearest [*engsten*] homeland.”<sup>17</sup> He often wrote to another close friend and fellow Schleswiger, the philosopher and historian of education Friedrich Paulsen, of his love of the dunes and marshes and of the wind outside on fall evenings, and observed in this context that anything “genuine” must be “lived” to be understood.<sup>18</sup> Such a view unquestionably found its way into his lively ideal-typical portrait of community life.

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<sup>16</sup> Uwe Carstens, *Ferdinand Tönnies, Friese und Weltbürger: Eine Biografie* (Norderstedt: Books on Demand, 2005), 17, 29, 319 n.2. The only recent study of Tönnies, this biography breaks little new ground, relying so extensively on previous sources that it occasionally adopts wholesale and without citation several passages from the 1971 work of E.G. Jacoby—compare, for instance, Carstens, 79 to Jacoby, 14). But wherever I was able to check it against Tönnies' letters or archival materials, it proved to be accurate, and it can serve as a useful reference for Tönnies' life, though not his thought, and as a rich source of visual and photographic materials from the Tönnies Arbeitsstelle.

<sup>17</sup> Tönnies to Høffding, 6 July 1897, in Ferdinand Tönnies and Harald Høffding, *Briefwechsel*, ed. Cornelius Bickel and Rolf Fechner (Berlin: Duncker & Humblot, 1989), 55. (“Engste” has the connotation of intimacy or closeness.)

<sup>18</sup> “...hineinleben muss man sich, wie in alles Echte, um die Sprache der Winde und Wellen zu verstehen.” Tönnies to Paulsen, 23 November 1885, in Ferdinand Tönnies and Friedrich Paulsen, *Briefwechsel, 1876-1908*, ed. Olaf



Perhaps in defense of Tönnies against the Nazi-era “blood-and-soil” interpretation of the notion of community, post-war scholars have emphasized that, even at an early age, he seems to have been marked more by cosmopolitan tendencies than by nostalgia or local patriotism.<sup>19</sup> Whether or not this is true,<sup>20</sup> it is well to observe that Eiderstedt community life was not as parochial as it first appears in retrospect. Tönnies’ biographer and the head of the Tönnies-Arbeitsstelle in Kiel, Uwe Carstens, observes that the North Sea coast farmers were an enterprising group, active far beyond the boundaries of their land. Whether because their Dutch and Frisian family backgrounds provided them with international contacts, a history of family geographic and social mobility, and direct involvement with trade and merchant activity, or because they needed to participate in the complex and large-scale dike and drainage projects needed to empty the marshes and reclaim land from the sea, the Eiderstedt yeomanry tended to have wider horizons than many farmers. Their prosperity, moreover, left them much time for politics, sociability, and the development of their cultural tastes, and they maintained close contacts with the towns and cities of northern Germany, Holland, Denmark, and England through their younger sons, who usually went into business or professional careers.<sup>21</sup> This pattern certainly applied to Tönnies’ own family, as his father was actively involved not only in local community life, but spent much of his time trading in the Hamburg grain markets and shifted his business from ranching to banking when Tönnies was still a child; in addition, Tönnies’ older

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Klose, Eduard Georg Jacoby, and Irma Fischer (Kiel: Ferdinand Hirt, 1961), 221; see also, e.g., 30 September 1905, 392.

<sup>19</sup> See, e.g., Mitzman, *Sociology and Estrangement*, 42; Carstens, 8; E.G. Jacoby, *Die moderne Gesellschaft im sozialwissenschaftlichen Denken von Ferdinand Tönnies* (Stuttgart: Enke, 1971), 116-17.

<sup>20</sup> Mitzman’s argument that Tönnies seemed positively disposed towards the new German Reich after 1870 does not necessarily show that Tönnies’ loyalties were to entities larger than the local community; in fact, it may be that his positive view of the Reich stemmed from his feelings as a member of the German minority in pre-1864 Schleswig, which was under Danish rule. We know that Tönnies and his friends disliked their obligatory Danish language and culture classes in school, and Tönnies’ close friend, the poet Theodor Storm, was vigorously anti-Prussian but supported leaving the Danish monarchy.

<sup>21</sup> Carstens, 18.

brother was a “man about town” in London, where he was a commercial representative for a German firm.<sup>22</sup> So Tönnies’ social background was not that of a “backwoodsman” or agriculturalist, but was instead firmly in the world of the German commercial middle classes: a circumstance he shared with other “founders” of sociology in the Kaiserreich, however much he may have come to dislike trade and traders.<sup>23</sup>

It is not surprising, then, that whatever attitudes Tönnies may have had about rootedness in community, he soon found himself engaging in activity more characteristic of what Mack Walker has called the “movers and shakers”—the professionals, the men of learning and commerce, the “disturbers” of traditional patterns of community life.<sup>24</sup> Tönnies had a foot in each camp of this group: if his family relied on the commodity exchanges and international business transactions for its wealth, he himself was, above all, interested in learning. It was unquestioned that Tönnies should attend the local humanistic Gymnasium; he later recalled that his family moved from Oldenswort to the market town of Husum in 1865 in order to further the children’s education.<sup>25</sup> His parents clearly placed great faith in his academic abilities: having observed the Tönnies family on his first visit, Paulsen later suggested that Ferdinand was clearly “the pride and the hope of his parents,” as a gifted student, and when he finished his university

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<sup>22</sup> Friedrich Paulsen noted in his autobiography that by the time he visited the Tönnies family in the early 1880s, the father had long since given up being a farmer to focus on stock market transactions; see Paulsen, *An Autobiography*, ed. and trans. Theodor Lorenz (New York: Columbia University Press, 1938), 288. On Tönnies’ brother Gert, see Carstens, 74.

<sup>23</sup> On Tönnies as “backwoodsman,” see Jose Harris, “General Introduction,” in Tönnies, *Community and [Civil] Society*, ed. Jose Harris (Cambridge: Cambridge University Press, 2001), xi, an account that is admittedly more balanced than this isolated comment suggests. This recent translation unnecessarily adds the word “civil” to the title; it will be cited below as *Community and Society*. On sociologists’ social circumstances, see Käsler, *Die frühe deutsche Soziologie*, 332ff., and Käsler, “Das Besitzbürgertum als zentrales Entstehungsmilieu der frühen deutschen Soziologie,” in Lars Clausen, et al., eds. *Tönnies Heute* (Kiel: Muhlau, 1985), 115-131.

<sup>24</sup> Mack Walker, *German Home Towns: Community, State, and General Estate, 1648-1871* (Cornell University Press, 1971).

<sup>25</sup> Tönnies, “Selbstdarstellung,” 199. The move was probably also occasioned by his father’s business arrangements at this politically unstable juncture in the history of Schleswig-Holstein.

studies later on, his father agreed to provide financial support for years of private study.<sup>26</sup> He was diligent in his schoolwork, and recalled in a short autobiographical account written in 1923 the “deep impression” made on him in his school years by the rector of the Husum Gymnasium, a philosophical man who introduced his students to the classics of German literature and ancient Greek philosophy and who, perhaps more importantly, inculcated in them (or at least in Tönnies) an emphasis on philosophical dualism.<sup>27</sup>

Another teacher, who doubled as the school’s librarian, led him to an early reading of Schleiermacher and of a book about Fichte and the “atheism controversy,” and Tönnies’ eager appropriation of these central figures of the classical period of German idealism reflected his early struggle with the problem of religious belief.<sup>28</sup> Coming from a long line of Lutheran pastors on his mother’s side, Tönnies by his own account had nevertheless settled into unbelief by his teens, accepting eagerly Fichte’s view of God as “the moral world order [*die sittliche Weltordnung*].” His views shifted back and forth owing to two friendships with older, philosophically-minded Christian students, and when an uncle gave him a copy of D.F. Strauss’s *Life of Jesus*, he was temporarily afraid to read it. But at some point during his university days the matter became decided, and he took up Strauss’s position against the less radical liberal theologians.<sup>29</sup> He retained a positive sense of the *social* role of religious belief as a foundation of communal solidarity, but he claimed that there no longer was any such thing as a “Christian community,”<sup>30</sup> and that any true expression of the religious spirit would now have to take form (if at all) in a new philosophical community. The traditional Catholic and Lutheran sacraments

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<sup>26</sup> Paulsen, *Autobiography*, 289; Tönnies to Paulsen, 26 November 1877, in *T/P Briefwechsel*, 5.

<sup>27</sup> Tönnies, “Selbstdarstellung,” 199-200.

<sup>28</sup> Carstens, 30-32.

<sup>29</sup> Tönnies, “Selbstdarstellung,” 201-203. Having initially attended classes in the theological faculty as well as the philosophical faculty at Jena (he noted laconically at this time that “Für Theologie war ich negativ stark interessiert” [202]), he soon abandoned them. See also Carstens, 51.

<sup>30</sup> Tönnies to Paulsen, 16 April 1881, *T/P Briefwechsel*, 124.

and “ ‘God’s word’ ” met his “scorn,” as he later wrote to his fiancée in 1893, and he thought that only by eliminating all remains of the “burden” of Christian “myths, legends, [and] dogmas” would the actual historical contribution of Christianity to western culture appear in the proper light.<sup>31</sup> Tönnies’ lifelong commitment to philosophical materialism and opposition to institutional churches led him to become a founding member of the German branch of the rationalist and anticlerical Ethical Culture Society.

A reckoning with traditional religion was a rite of passage for late nineteenth-century German students; so too was the practice of moving about from university to university. Tönnies began his post-secondary studies with an attempt to enroll at the newly re-founded German university in Strassburg in the summer semester of 1872. He later recalled this choice as being motivated by his “high German consciousness,” but it was at least as likely that he was buoyed by a desire to study philology there with Friedrich Max Müller, to whom he had been recommended by his fellow Husum resident and mentor, the poet and novelist Theodor Storm.<sup>32</sup> The plan did not pan out; concerned about the sanitary conditions in Strassburg, he quickly left for Jena, where he joined his cousin in the “Arminia” Burschenschaft, one of the more liberal student fraternities, and spent a year primarily in philological and philosophical study. He enrolled for the winter and summer semesters of 1874 at Leipzig and Bonn, respectively, and, having suffered a head injury while drunkenly cavorting, elected to perform his required military service in 1875, abbreviated as it was by medical leaves. The rest of Tönnies’ studies brought

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<sup>31</sup> Letter to Marie Sieck, quoted in Carstens, 135; Tönnies to Paulsen, 29 October 1900, *T/P Briefwechsel*, 347. Liebersohn provides no evidence for his claim that Tönnies played down his “struggle to break free of Christianity” in his memoirs or that the process was more complicated than Tönnies indicated; see Liebersohn, 38.

<sup>32</sup> Tönnies, “Selbstdarstellung,” 202; see letter of Storm to Müller, 17 April 1872, pp. 359-60 in Tönnies-Storm Briefwechsel, edited by Heinrich Meyer, in *Monatshefte für deutschen Unterricht* 32:8 (December 1940), 355-380.

him to Berlin in the winter of 1875-76, to Kiel the following summer, back to Berlin, and finally to Tübingen, where he received his doctoral degree in classical philology in 1877.<sup>33</sup>

We know much about Tönnies' intellectual influences from the beginning of his university studies until 1887, when he published *Gemeinschaft und Gesellschaft*, in large part because he was himself always forthcoming about them. In fact, he was so free with his acknowledgements that we can make mention only of the major figures in Tönnies' intellectual development, and of those directly relevant to understanding his views on science, values, and the process of European modernization.<sup>34</sup>

There were two great personal influences on the early Tönnies: Theodor Storm and Friedrich Paulsen. The former powerfully shaped Tönnies' worldview and ideological leanings during his student days, helping to produce or at least to develop in Tönnies the sense of pessimism and the premonitions of the decline of western culture which were to mark him throughout his life.<sup>35</sup> But Tönnies did not stay for very long in the world of literary culture and philology that Storm opened for him. His interest in the history of philosophy led him from Kuno Fischer's lectures at Jena to the Berlin philosophy seminar of Paulsen, nine years his elder and a new *Privatdozent*, in 1875. Along with a third Schleswiger, Kuno Francke (later a

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<sup>33</sup> Ibid., 202-207; Carstens, 46-71.

<sup>34</sup> Many scholars have now studied the intellectual origins of *Gemeinschaft und Gesellschaft* specifically, which is not our task here; see in particular Mitzman, *Sociology and Estrangement*, which is based almost entirely (but very thoroughly) on the correspondence with Paulsen; Niall Bond, "Sociology and Ideology in Ferdinand Tönnies' *Gemeinschaft und Gesellschaft*," Inaugural Dissertation, Albert-Ludwigs-Universität (Freiburg im Breisgau, undated [1994]), which limits itself more to the background to Tönnies' classic text than to the text itself; Manfred Walther, "Gemeinschaft und Gesellschaft bei Tönnies und in der Sozialphilosophie des 17. Jahrhunderts..." in Clausen and Schlüter, *Hundert Jahre "Gemeinschaft und Gesellschaft"*, 83-106; and the most formidable study of the philosophical aspects of Tönnies' thought, Peter-Ulrich Merz-Benz, *Tiefsinn und Scharfsinn: Ferdinand Tönnies' Begriffliche Konstitution der Sozialwelt* (Frankfurt: Suhrkamp, 1995).

<sup>35</sup> The closeness of their relationship (but little else relevant here) is clearly demonstrated in the Tönnies-Storm Briefwechsel, few of Tönnies' letters to Storm having been preserved; Tönnies published several short studies of his mentor following the latter's death in 1888, which he then collected in 1917 in the short monograph *Theodor Storm: Gedenkblätter*, reprinted in *TG 10, 1916-1918* (Berlin: de Gruyter, 2008), 363-425. Niall Bond argues that the relationship with Storm was definitive for Tönnies' worldview and (to my mind implausibly) that it outbalanced that with Paulsen: Bond, "Sociology and Ideology," Ch.3.

professor at Harvard), Tönnies and Paulsen made a habit of letting their discussions of Kant's *Critique of Pure Reason* continue long after the seminar meetings had ended, and they both later recalled their conversations as quickly branching out into social and political discussion over beers at the Café Suisse.<sup>36</sup> "Paulsen's influence on me was significant from the beginning," reflected Tönnies fifteen years after Paulsen's death. "[H]is point of view on the history of philosophy, his natural scientific and historical knowledge, but still more his personality (pervaded with pure appreciation for truth and social conscience) left deep and fruitful workings in me."<sup>37</sup> Their correspondence, which began in 1876 and lasted until Paulsen's death in 1908, records an intensive intellectual exchange, especially in its first decade.

It was certainly the first of the three areas of Paulsen's influence named by Tönnies that had the greatest immediate effect on his career. Paulsen strongly suggested working on the history of *pre-Kantian* Enlightenment and proto-Enlightenment philosophy, and specifically on the thought of Thomas Hobbes.<sup>38</sup> Wanting to pursue his growing interest in modern philosophy and social thought, and suffering from continuing headaches as a result of his head injury two years before, Tönnies retired to Husum for concentrated study of Hobbes' Latin and English works as a foundation for further development. It would become his entry into the world of academic scholarship.<sup>39</sup> Following a trip to England in 1878 in which he uncovered several neglected Hobbes manuscripts and many unknown letters, Tönnies began a series of publications on Hobbes that would span his career and radically alter the accepted picture of the philosopher of Malmesbury as an empiricist follower of Bacon. Along with Spinoza, to whom Tönnies turned

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<sup>36</sup> Paulsen, *Autobiography*, 203; Tönnies, "Selbstdarstellung," 206-207.

<sup>37</sup> Tönnies, "Selbstdarstellung," 206; see also Tönnies' remarks to Paulsen himself on how much the latter had influenced his thinking: letter of 22 October 1887, *T/P Briefwechsel*, 238.

<sup>38</sup> Bernard Willms, "Monstrum oder Mutterschoss? Bemerkungen zum Stellenwert der Hobbes-Forschung im Werk von Ferdinand Tönnies," in Clausen and Schlüter, eds., *Hundert Jahre "Gemeinschaft und Gesellschaft"*, 395, argues that Paulsen's suggestion inoculated Tönnies against the (for Willms) "wrong track" (*verrannten*) tendency of philosophical research in his day toward neo-Kantianism.

<sup>39</sup> Tönnies, "Selbstdarstellung," 207.

next, in the late 1870s and early 1880s, Hobbes had a profound effect on Tönnies' own thought.<sup>40</sup>

Tönnies read voraciously and eclectically during these years. At the same time as he was learning to understand Kant under Paulsen's guidance in 1875—without, it is true, being marked by the growing neo-Kantian revival of the critical philosophy—Tönnies absorbed the still popular Schopenhauer, whose theory of the will would combine with the elements of voluntarism in Hobbes and Spinoza to make a biologically-inflected “will” a central category for Tönnies' social theory.<sup>41</sup> And more remarkably, Tönnies was almost certainly the first important thinker to appropriate the work of Friedrich Nietzsche. Already in the summer of 1872 in Jena, Tönnies took note of Nietzsche's recently published first book, *The Birth of Tragedy*, in the window of a bookstore, reading it later that year at home in Husum “with pleasure, indeed nearly with the feeling of a revelation.”<sup>42</sup> Nietzsche's *Untimely Meditations*, especially those on D.F. Strauss and the “Uses and Disadvantages of History for Life,” profoundly affected Tönnies, who continued to read each of Nietzsche's books upon publication, with an enthusiasm that continued through the 1870s but then diminished with what he saw as the increasingly anti-social aristocratic tone of the late writings.<sup>43</sup>

But Tönnies also found himself fascinated by the more concrete problems of the social and political world. His interest in “the social question,” furthered by both Storm and Paulsen, was honed in the Berlin statistical seminar of Adolf Wagner, where Tönnies' desire to study “population- and moral-statistics” first developed in 1878-79. Over the next decade, he would

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<sup>40</sup> See below, Section III a), for more on Hobbes' impact.

<sup>41</sup> Cornelius Bickel, *Ferdinand Tönnies: Soziologie als skeptische Aufklärung zwischen Historismus und Rationalismus* (Opladen: Westdeutscher Verlag, 1991), 280ff.

<sup>42</sup> Tönnies, “Selbstdarstellung,” 203.

<sup>43</sup> *Ibid.*, 204-205; on the evolution of Tönnies' views of Nietzsche from great enthusiasm to suspicion, see, e.g., letters of 9 November 1880, 30 October 1881, 29 October 1900 in *T/P Briefwechsel*, 98; 143; 348.

engage with major texts in several different traditions relevant to political and social thought. The juristic sciences were perhaps his greatest passion in the 1880s; from the natural law tradition of the early Enlightenment, profoundly shaped by his reading of Hobbes as well as Pufendorf and Christian Wolff, he moved to assimilate the criticisms of Savigny and the “historical school of law” of the early nineteenth century, and drew deeply on more recent work by the legal scholars Henry Maine, Otto von Gierke, and Rudolf von Jhering. In political economy, he began with Adam Smith, David Ricardo and Wilhelm Roscher in 1877, and he continued the following year with the major figures of socialist political economy in Germany at that time, including Karl Rodbertus, and, although without much understanding at first, the first volume of Marx’s *Capital*. His study included the main works of mid-nineteenth-century sociology and anthropology: Comte, Spencer, and Albert Schäffle, among others. Finally, Tönnies followed Paulsen in absorbing some of the natural scientific literature of his own day, from Darwin through James Clerk Maxwell.<sup>44</sup>

What did Tönnies draw from this wide reading? For our purposes, several themes are worth noting which will bear on our analysis below. First, in his philosophical training, Tönnies was marked—more than any other major German social thinker of his day—by his reception of pre-Kantian philosophy, and particularly by that of the seventeenth century. His commitment to materialism and determinism was fed by these sources, especially Hobbes and to some extent Spinoza, as well as by nineteenth-century natural science; and the place of “will,” of the “atomistic” individual, and of natural law in his own social science reflected these seventeenth-century sources more than any others. This philosophical focus also differentiated him sharply

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<sup>44</sup> Ibid., 207-213. The exact details of what Tönnies read and when during this period are known, but not especially important here. The Tönnies-Paulsen Briefwechsel provides a thorough supplement to Tönnies’ autobiographical reflections, and is quite accurately reconstructed in Mitzman, *Sociology and Estrangement*.



from many of the other figures instrumental in the growth of the fact-value distinction, because unlike them he was not profoundly affected by the heritage of Kant and by neo-Kantianism.

Second, his understanding of political economy and the concept of economic value derived solely from the classical economists and the labor theory of value, as mediated through the German historicism represented by Roscher, and through Marx's later works. Tönnies either was unfamiliar with, did not understand, or did not accept the results of the "marginal revolution" in placing emphasis on the demand side of the equation and on the subjective valuation of the consumer.<sup>45</sup> His continuing commitment to the idea that economic value could be objectively measured and that capitalism involved the extraction of "surplus value" from industrial workers meant that, like Sombart but unlike Weber, Schumpeter, or other figures considered in the previous chapter, Tönnies could not have been influenced in considering valuation subjective by a reading of marginalist economics or of the incipient subjectivism of earlier German economists in the tradition of Rau.

Third, he was familiar with both major competing traditions in the conceptualization of the sciences of state and society of his day: like nearly all Germans, he had drunk deep at the well of the nineteenth-century historical schools with their broadly hermeneutic methods and their underlying tendency to relativism, while, unlike many of his peers, he retained throughout his life an exceptionally detailed knowledge of the Anglo-French currents of empiricist and "positivist" social science oriented toward generalization, lawfulness, and the study of historical causality.

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<sup>45</sup> While Tönnies must have been aware of the *Methodenstreit* in economics because of his ties to Berlin political economy, especially through a close relation to Adolf Wagner, he did not necessarily read the work of Carl Menger or his students, let alone that of Jevons, Walras, or Alfred Marshall. There is no mention of any of these economists in Tönnies' correspondence with Paulsen, and he did not make even a vague reference to the marginalist approach until the 1912 edition of *Gemeinschaft und Gesellschaft* (see "Postscript, 1911," in Harris, ed., *Community and Society*, 90), a note which does not demonstrate any engagement with marginalist arguments. The first acknowledgement of a subjective approach to economic value in Tönnies appears, to my knowledge, in his 1921 study of Marx: *Leben und Lehre*.

Finally, his social-political interests and reading in the socialist literature inoculated him against the assumption of inevitable historical progress underlying some of the western European Enlightenment and nineteenth-century liberal traditions, while his own skepticism regarding the future of western civilization kept him from embracing the equally dogmatic claims of the Second International Marxists and of social democrats to whom he otherwise stood close in his politics.

In the next two sections, we will consider how Tönnies, drawing on his wide reading, built a vision of the development of modern life that revealed the inherent subjectivity of values and shaped his view of value-free science. But first we turn to examine his academic career and his political views, since his personal circumstances surely must have been relevant to his adoption of value-freedom, however difficult it would be to demonstrate such a claim.

His intensive study of so many different currents of thought led Tönnies to produce a wide-ranging and powerful book, published, too soon for his taste, in 1887. *Gemeinschaft und Gesellschaft*, which is still synonymous with his name for most readers, was far from an immediate success. Although it received generally positive reviews, it sold at most a few hundred copies in its first two years, and the initial print run of 750 copies did not sell out for a quarter-century.<sup>46</sup> Disappointed, Tönnies moved from working on theoretical sociology to what was then known as “moral statistics,” and particularly to work on the sociology of criminality and prison populations. He had been teaching philosophy as a *Privatdozent* at the University of Kiel since 1881, where an early draft of *Gemeinschaft und Gesellschaft* had been turned down as his *Habilitationsschrift*, although a series of substantial articles on Hobbes was accepted in its place. Tönnies hated teaching at Kiel; he thought his colleagues were beneath him, and he felt little obligation to his students, sometimes announcing a course for the following semester and

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<sup>46</sup> Tönnies to Paulsen, 29 December 1889, *T/P Briefwechsel*, 273; “Selbstdarstellung,” 216.

then deciding not to give it after all.<sup>47</sup> And yet, he would be associated with the university for over fifty years.

After 1887, Tönnies concentrated both his teaching and his own studies on the social sciences, with an occasional book, article, or course offering on a topic in early modern philosophy. He had hoped to receive a professorship on the strength of his first book, but his colleagues were understandably concerned about his demonstrated lack of interest in teaching in the 1880s, and so he first received a titular professorship in 1891. The master of the Prussian educational bureaucracy, Friedrich Althoff, offered Tönnies an *Extraordinarius* professorship in 1893 on the condition that he resign from his prominent place in the recently founded Ethical Culture Society, but Tönnies, never one to compromise his ideals, refused. He would not be promoted to *Extraordinarius* until 1908.<sup>48</sup> His sociological publications in the 1890s concentrated on criminology and on the growth of international sociological literature, which he diligently and extensively reviewed for various journals. In addition to writing on cultural questions of various sorts for the journal of the Ethical Culture Society, Tönnies produced a major study of Hobbes' life and work in 1896 and a polemic against the growing Nietzsche cult in 1897, while simultaneously writing a series of articles chronicling the tempestuous dockworkers' strike in Hamburg during the winter of 1896-97.

Around the turn of the century, Tönnies occupied himself with writing prize-essays in order to supplement his teaching income. He won the Welby Prize, established by an English aristocrat, with an article on philosophical terminology that was translated in the journal *Mind*,

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<sup>47</sup> See, e.g., Tönnies to Paulsen, 27 March 1881 and 25 April 1885, in *T/P Briefwechsel*, 119; 214. Tönnies preferred to think of himself as an independent philosopher whose "*Alleinfliegen*" put him in the company of Hobbes, Descartes, Spinoza, Locke, Leibniz, and others ("Selbstdarstellung," 216). The more grounded Paulsen came to the conclusion that Tönnies thought Kiel "so far beneath his dignity that he rejected every opportunity which offered itself for lecturing. He regarded it as low to adapt oneself to the needs of the students, and any special preparation for a lecture he scorned as theatrical humbug." Paulsen, *Autobiography*, 330.

<sup>48</sup> Carstens, 129, 192-93.

and devoted much time and hundreds of pages to combating the social Darwinist Wilhelm Schallmayer, who had been selected over Tönnies in a Krupp-financed essay competition on the application of natural selection to domestic politics in 1900. Tönnies joined Weber, Sombart, and many others in traveling to the United States in 1904 for the Exhibition in St. Louis. Here he gave a paper which marked a shift back to an interest in “pure” or theoretical sociology, which Tönnies would continue to elaborate in papers and books throughout the rest of his life. In 1908, at the time of the death of Althoff and of his friend Paulsen, he received a professorship at Kiel in “*wirtschaftliche Staatswissenschaften*,” an expression he despised. The following year brought the founding of the DGS, of which Tönnies assumed the presidency, and which he served throughout its two pre-war conferences as well as upon its revival in the 1920s. Made a full professor in 1913, Tönnies retired from teaching three years later, but continued to publish actively and take part in conferences until shortly before his death in 1936.<sup>49</sup>

In 1932, as a protest against the growing power of the Nazis, Tönnies joined the Social Democratic Party (SPD). He had insisted throughout his life that he was not a social democrat: whatever the “‘well- but lightly educated’” (“‘*Viel- aber Leichtgebildeten*’”) might think following his endorsement of the Hamburg dockworkers’ cause, “I have never been [a social democrat], neither openly nor in secret—because my way of thinking differed considerably on a few matters, and because I was greatly reluctant [*weil ich grosse Scheu davor hatte*] to lose myself in practical politics.” That said, Tönnies also condemned the other parties and the government for their treatment of the SPD.<sup>50</sup> This retrospective description from 1923 accorded well with the views he had earlier expressed.<sup>51</sup>

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<sup>49</sup> Tönnies, “Selbstdarstellung,” 219-225, provides the basic data.

<sup>50</sup> Ibid., 220.

<sup>51</sup> Tönnies to Høffding, 6 July, 1897, *T/H Briefwechsel*, 55.

Unwilling to join a party or to accept Marxist orthodoxy, Tönnies preferred the stance of the independent scholar, but the direction of his sympathies was not in doubt. From the first, his exchanges with Paulsen indicated his deep dissatisfaction with modern liberalism, a growing antipathy to the state (in contrast to Paulsen, who began with Lassallean state-socialist views), and the general conviction that “the Social Democrats are, as almost always, right.”<sup>52</sup> Tönnies was able to join with his peers in the Verein für Sozialpolitik in the hope of a “new course” in the politics of the early 1890s, which would allow for the broad stream of German liberalism to accept a raft of state-imposed social reforms designed to improve conditions and security for industrial workers. But he positioned himself to the left not only of the monarchist state-socialists like Schmoller and Wagner, but also of Lujo Brentano’s commitment to free trade and non-political trade unions and of Max Weber’s tendencies toward “social imperialism”; he was not only a thoroughgoing advocate of parliamentarization, but went all the way with Marx in believing that the state was essentially an apparatus designed to meet the needs of the “bourgeois” classes “for the regulation of social antagonisms.”<sup>53</sup> His political convictions were on most open display in his study (for the *Archiv für soziale Gesetzgebung*) of the conditions underlying the Hamburg strike, in which he simply took the side of the striking workers. Instead of arguing in this case that social science must itself be ethically inflected, however, Tönnies attempted to stay within the mantle of value-freedom by proclaiming that science was truly impartial (*unbefangen*) when it saw that the “truth” lay with the workers, and that it was instead “corrupted” public opinion that was “partisan”; he used the opportunity to express concerns that

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<sup>52</sup> Tönnies to Paulsen, 29 September 1878, *T/P Briefwechsel*, 47.

<sup>53</sup> On Tönnies’ politics, see especially Bickel, *Ferdinand Tönnies*, 215-235; quotation on 218.

in the era of Baron von Stumm, scientific knowledge was threatened by the impediments to academic freedom set up by “capital.”<sup>54</sup>

Tönnies was convinced that state employees, including professors, need not be “hindered... from supporting a party [in matters] outside of their official conduct; on the contrary, insofar as we are dealing with ‘intellectuals,’ this is highly desirable.”<sup>55</sup> Like many other advocates of value-freedom in practice, he certainly crossed the border between official and unofficial conduct with some frequency in making value judgments, perhaps unconsciously, but he did not do so in the name of a moral “science.” As in the case of other sympathizers with socialism such as Sombart and Gustav Radbruch, the claim of value-freedom may well have attracted Tönnies at least in part as a means of defending his work against the hostility generated by his political views among the conservative establishment in the universities and the ministerial bureaucracy.

Let us now turn to Tönnies’ historically-inflected account of the nature of values and sources of normative authority in traditional and modern forms of social organization, after which we will consider the specific nature and the importance of the value subjectivism he reveals for his theoretical reflections on value-freedom.

## **II. Values and Normativity in “Community” and in “Society”**

Throughout his later career, Tönnies claimed that his image of two fundamental forms of social organization, *Gemeinschaft* and *Gesellschaft*, was a contrast of pure types and not an account of historical progression. But from the first, readers saw a historical account, even a

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<sup>54</sup> Quoted in *ibid.*, 248.

<sup>55</sup> Tönnies to Paulsen, 18 April 1899, *T/P Briefwechsel*, 341-42.

philosophy of history, embedded in the dichotomy, and through many of his own comments in *Gemeinschaft und Gesellschaft* Tönnies made it easy to accept this interpretation despite his protests. Moreover, he very much endorsed the legitimacy of attempts to account for historical development through the use of sociological theory, an attempt he labeled “applied,” as opposed to “pure,” sociology.<sup>56</sup> His interest in the historical development of the West was deep and abiding, reflected in his very first publication, on classical antiquity, and in his very last: the sweeping but unfinished *Geist der Neuzeit*, part of which appeared in 1935 just before Tönnies’ death, and which he had worked on sporadically for three decades. So it is not surprising that Tönnies’ writings yield an interpretation of history that attempts particularly to make sense of the nature of modernity by contrasting it with antecedent forms of European social organization and culture. This section explores the ways in which his interpretation of Western history sheds light on his views on the nature of individual and social values, on the sources of normativity, and on the nature of science.

Inevitably, we must look first to *Gemeinschaft und Gesellschaft* for an understanding of Tönnies’ account of modernity. It is not immediately obvious that we are entitled to do so; if the dichotomy in the title is truly one of ideal types and really existing social relations always embody a mix of the two, then perhaps it is illegitimate to consider the book as telling a story of transition from one form of life to another. But Tönnies’ own intentions were ambivalent. In 1882, having finished the early and highly schematic draft of *G&G*, and immersed in the literature of legal philosophy and speculative anthropology, Tönnies wrote to Paulsen that he was

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<sup>56</sup> On Tönnies’ differentiation between pure and applied (and empirical-statistical) sociology, see especially E.G. Jacoby, “Three Aspects of the Sociology of Tönnies,” in Cahnman, *Ferdinand Tönnies: A New Evaluation*, 70-102. Werner Cahnman rightly observes that Tönnies’ commitment to “value-free” social science *in practice* was clearest in his “pure” sociology, and that he was much less careful to exclude value judgments in his applied or empirical sociology—in this, Tönnies was not altogether different from Max Weber, as the famous passages on the effects of modern capitalism toward the end of Weber’s *Protestant Ethic* suggest: see Cahnman, “Introduction,” in *ibid.*, 17; and *id.*, “Max Weber and the Methodological Controversy in the Social Sciences,” reprinted in Cahnman, *Weber & Tönnies: Comparative Sociology in Historical Perspective* (New Brunswick, NJ: Transaction, 1995), 30.

considering “building up [a] philosophy of history out of the elements of my concepts Gemeinschaft and Gesellschaft,” although he sometimes worried that they were too trivial and widely understood for it to achieve originality.<sup>57</sup> And on the work’s appearance five years later, he clearly offered a portrait of the two concepts as representing epochs or historical stages each associated with its own particular forms of normativity.<sup>58</sup> Despite cautioning that care must be used in applying his “schematic” concepts, he wrote to Høffding that he thought himself authorized through the evidence of history and experience to see them as representing reasonably well the actual course of events.<sup>59</sup> Not only Paulsen, but other initial readers such as Høffding, Schmoller, Gierke, and Durkheim, interpreted the book this way, and a seminal 1955 centenary essay on Tönnies made a strong case for seeing the book as reflecting nineteenth-century philosophy of history.<sup>60</sup> Without prejudging the issue of whether “community” and “society” *can* be used as pure types, we shall pursue a similar interpretation by recognizing that the book indicates Tönnies’ view of existing historical *tendencies*, not descriptions meant to claim complete validity at any given time.

Tönnies’ overall philosophy of history was cyclical, or at least consisted of two great cycles. Gemeinschaft was most closely associated for Tönnies with pre-Roman antiquity and with the high middle ages, while classical antiquity and the modern world since about 1500 displayed a predominant tendency toward Gesellschaft.<sup>61</sup> He expressed certainty, too, and from an early age, that the present culture of the West, which he variously identified as Christian,

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<sup>57</sup> Ibid., 26 January 1882, 147.

<sup>58</sup> Tönnies, *Gemeinschaft und Gesellschaft: Abhandlung des Communismus und des Socialismus als empirischer Culturformen* (Leipzig: Fues, 1887), 289 [hereafter *G&G*]; *Community and Society*, 257 [hereafter *C&S*].

<sup>59</sup> Tönnies to Høffding, 14/19 October, 1888, *T/H Briefwechsel*, 41.

<sup>60</sup> See, e.g., 12 September 1887, 12 February 1888, *T/P Briefwechsel*; Durkheim’s review of *G&G* is translated in Cahnman, ed., *Ferdinand Tönnies: A New Evaluation*, 240–47; René König, “Ferdinand Tönnies,” in *Soziologie in Deutschland: Begründer, Verfechter, Verächter*. Munich: Carl Hanser, 1987. The original version of König’s essay was in the *Kölner Zeitschrift für Soziologie und Sozialpsychologie*, Vol. 7 (1955), 348–420.

<sup>61</sup> Tönnies argues for this parallel in many places. See, e.g., “Herbert Spencers soziologisches Werk,” (1889), in *SSK I*, 75–104; 100.



Germanic, and European, was in a steady state of decline. Even if it took another five hundred years, modern European culture would follow the Gesellschaft-like path of the Hellenistic-Roman culture before being swept away.<sup>62</sup> He did not venture specific predictions as to the nature of the coming culture, but he thought that it would again include more Gemeinschaft-like elements, possibly those envisioned by socialism.<sup>63</sup> Nevertheless, these cycles were not entirely self-contained, but embodied some kinds of continuity, which might conceivably allow a process of gradual betterment as favorable elements of each type of social organization were retained. Always mindful of the passing of the Roman world and its legacy to the successor civilization of “German” Europe, as he wrote to Høffding in 1899, he thought it was our task to “order our house” and “bequeath the culture which will come after us as well-maintained a legacy as possible.”<sup>64</sup> Human history, like the material world, was without meaning in itself, but that fact should not hinder the possibility of “reason” (*Vernunft*) becoming “free” in the minds of men through culture.<sup>65</sup> And without question it was “reason” and science that struck Tönnies as the principal “legacy” which modernity, like Roman antiquity before it, might offer to a future civilization once the wheel had turned again.

How most appropriately can we characterize the two types of social organization which made up this gradually blending cyclical process, and thereby also the medieval and modern worlds respectively? Tönnies’ best known works are full of detail, which sometimes threatens to overwhelm through its sheer variety and (it must be said) disorganization, but I will argue here that the thread of continuity lies in Tönnies’ assessment of *the sources of normative guidance for*

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<sup>62</sup> Tönnies expressed this view as early as his 10 March 1881 letter to Paulsen, *T/P Briefwechsel*, 115; and wrote as much to Høffding eighteen years later: 29 June 1899, *T/H Briefwechsel*, 68.

<sup>63</sup> Tönnies, “Das Wesen der Soziologie” (1907), *SSK I*, 350-68, 367; translation as “The Nature of Sociology,” in *On Sociology: Pure, Applied, and Empirical*, ed. Werner Cahnman and Rudolf Heberle (Chicago: University of Chicago Press, 1971), 106.

<sup>64</sup> Tönnies to Høffding, 29 June 1899, *T/H Briefwechsel*, 68.

<sup>65</sup> Tönnies to Paulsen, 29 September 1878, *T/P Briefwechsel*, 47.

*the individual acting person and the type of “means-ends” orientation dominant in a given society.* Put another way: Gemeinschaft and Gesellschaft formations can be differentiated according to the types of values they promote and the way in which they promote them, and according to the way in which people *pursue* these values in their own actions. A picture thus emerges of the attitudes toward values prevalent in the modern world, in contrast to those of the medieval world. Nevertheless, I will also argue, there is as well an underlying continuity across both forms of social organization in that regardless of how it may appear to the social actors themselves, the ultimate basis of values and norms is in the wills of individual human animals. That is to say, values for Tönnies are in the last analysis subjective.

#### **a) Forms of Normativity in Gemeinschaft**

“The natural, underlying, and—for us—lost constitution of civilization is communistic [*communistisch*], while the contemporary and developing [*werdende*] constitution is socialistic [*socialistisch*],” wrote Tönnies in the preface to the first edition of *G&G*, using the terms “communism” and “socialism” in order to be provocative but with the broad meaning of “community-like” and “society-like.”<sup>66</sup> And, indeed, he would always hold that Gemeinschaft was more “natural” than Gesellschaft, and that it alone was “real” while Gesellschaft included an element of fictiveness.<sup>67</sup> The easiest way of understanding what Tönnies meant by these characterizations is to recall his commitment to nineteenth-century natural science, not to romantic nostalgia. Gemeinschaft was most “real” and most “natural” because it embodied first and foremost the social relations that developed out of pure biological and kinship relations, and

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<sup>66</sup> Tönnies, 1887 Preface, *G&G* xxviii; *C&S*, 13.

<sup>67</sup> See, e.g., “Zur Einleitung in die Soziologie” (1899), in *SSK I*, 65-74; 67; partially translated as “A Prelude to Sociology,” in *On Sociology*, 77; also, Tönnies to Høffding, 14/19 Oct 1888, *T/H Briefwechsel*, 35.

the effects of stable and close physical proximity to other human animals claiming descent from a common ancestor.<sup>68</sup>

Tönnies discussed these most basic relations—between mother and child, between siblings, between husband and wife, and what he saw as the slightly less intimate relations between father and children, between friends, and between neighbors—in detail in the first book of *G&G*. For our purposes it is most important to note that in Tönnies’ thinking, the most basic sources of normativity in *Gemeinschaft* lay with the authority of parents and elders, living and dead, mortal and divine (for Tönnies, gods were obviously substitute lords or parental figures), individual or corporate—and sanctioned by long usage and a common past. In the short book on custom or mores, *Die Sitte*, which Tönnies wrote in 1909 for Martin Buber’s series on social phenomena, he noted that the validity of customary rules in any *Gemeinschaft*

is based on the general judgment that “we must and we want to act as our forefathers have acted; we must and we want to follow their example and their precedents.” This reasoning can and does quite easily lead to the further thought, “for that is useful and wholesome for us” and “since our elders knew what is right, their wisdom is superior to ours,” and “the way they have done things has been tried out and proven as immemorial usage, as the way in which tradition has maintained itself.” Thus understood, acquiescence to custom and fostering of custom are only special cases of obedience and imitation through which the young and disciples follow their parents and masters and learn from them.<sup>69</sup>

Paternalistic *Gemeinschaft* may be, but that does not mean that it ought to be seen as oppressive to its members, Tönnies claimed. Like all social relationships, he held, those of *Gemeinschaft* are positively willed or affirmed by its members, and that includes relationships

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<sup>68</sup> See Tönnies, *G&G*, Book I, Sections 1-6.

<sup>69</sup> Tönnies, *Die Sitte* (Frankfurt: Rütten & Loening, 1909) 17-18; *Custom*, translated (unreliably) by A. Farrell Borenstein (Glencoe: Free Press, 1961), 43. On gods as substitute lords, see *Die Sitte*, 23-24; *Custom*, 51.

that stratify authority.<sup>70</sup> Tönnies famously associated *Gemeinschaft* and *Gesellschaft* with two different types of human “will,” which he called *Wesenwille* (natural will), and *willkürliche Wille* or *Kürwille* (arbitrary or rational will).<sup>71</sup> *Wesenwille*, which supports *Gemeinschaft*, grows out of the individual’s orientation to pleasure or liking (*Gefallen*), is strengthened through habituation (*Gewohnheit*) in which that which is repeated becomes “agreeable” and ultimately indispensable simply because it is repeated, and through shared memory (*Gedächtnis*) can conjure up a knowledge and love for the habitual common to several persons or a whole community.<sup>72</sup>

If individual wills are shaped by these common experiences and expectations, they may come to comprise a “general will” (*allgemeine Wille*) or a “will of the people” (*Volkswille*).<sup>73</sup> This will of the people is portrayed by Tönnies in *Die Sitte* in a Burkean fashion as an agreement between the dead, the living, and those to be born, in the service of preserving a sort of “‘natural law’—that is, ...a tacit understanding about what has to be.” Established perhaps by the gods, and certainly by ancestors to whom is due the “natural” fear, reverence, and honor also felt by the child for the parent or by the weak for the strong, this natural law is nonetheless actively reaffirmed in all performance and activity by the people who live in a *Gemeinschaft*.<sup>74</sup> The source of normative guidance, of the values by which people are to direct their lives, is seen to be

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<sup>70</sup> One of the chief claims of Tönnies’ sociology is that social relationships are affirmative. This is, for all intents and purposes, simply a matter of definition: Tönnies does not deny the presence of conflicts between people, but he does claim that no social entity can survive unless it is more affirmed than denied. Consequently, relationships based more on conflict than on mutual affirmation (including affirmation of a *purely* instrumental sort in *Gesellschaft*) are not considered “social” relationships. See e.g. *G&G*, 1; ‘Das Wesen der Soziologie,’ 351f.

<sup>71</sup> In the 1887 edition of *G&G*, Tönnies used the phrase “willkürliche Wille,” meaning a will capable of making free, arbitrary choices; in the 1912 edition he replaced this phrase with his own coinage, *Kürwille*. Coming from the old German verb “küren,” to choose, Tönnies’ word is often translated “rational will,” although this can confuse things because Tönnies often (but not always!) claims that *both* forms of will are “rational.” I will use the German words throughout this chapter.

<sup>72</sup> Tönnies, *G&G*, 106-112; *C&S*, 101-106.

<sup>73</sup> Tönnies recognized that these concepts are highly questionable; his nominalistic inheritance led him repeatedly to deny that social or popular will could be seen as a real entity *except insofar as individuals believed it to be one and acted accordingly*. See e.g., “Zur Einleitung in die Soziologie,” 65. Nevertheless, he sometimes spoke as though social entities or the *Volkswille* were really existing things.

<sup>74</sup> Tönnies, *Die Sitte* 15, 18-19; *Custom*, 39-40, 44-45; *G&G*, 249-52; *C&S*, 223-26.

tradition, in whatever guise it takes. But we might say that the source of the “legitimacy” of that tradition lies in the *continued active willing of the individuals who make up the community*.

Thus, in the case of political authority, Tönnies says, the enhanced honor and freedom of action appertaining to the ruler is granted by the “general will” of the community within the limits set by a corresponding duty to serve the community. The origin of the right or law (*Recht*) that establishes authority is in the will; it is not objectively “given”: “The influence of will (*die Willenssphäre*), and so the will of the community, is a mass of determinate force, power or right; and right is both the embodiment of will in the form of ability or permission to act, and will as obligation or duty.”<sup>75</sup> Inequalities in power which arise by the very nature of political authority must be kept within limits, or the community will collapse, for if any group has too much or too little power, the function of community (creating unity out of diverse elements) will not be fulfilled. In this situation, what has united the individual wills no longer obtains, and the consequence of communal dissolution makes it obvious that for Tönnies the actual power of traditional authorities to provide normative guidance depends on the perception of *legitimacy* accorded to those authorities by the individual subjects. For when a functional community is dissipated through the perception of illegitimate use of power, the individual will begin to guide his actions according to his own moral compass, provided by nature and “inherited powers and drives.” “The less people who come into contact with one another are linked together in the same community, the more they are ranged against one another as free subjects of their own desires and powers. This freedom will be all the greater the less they feel themselves to be dependent on some *predetermined* guiding power, specifically stemming from the will of some community.”<sup>76</sup>

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<sup>75</sup> Tönnies, *G&G*, 22; *C&S*, 32.

<sup>76</sup> *Ibid.* On political authority, see also *G&G* 261-62; *C&S* 233-34.

In *Gemeinschaft*, then, guiding values derive from tradition, from the authority of gods and elders, from customary practices seen as natural laws. Individuals recognize and affirm these seemingly “external” normative demands on their actions, and they act accordingly, without being aware that the norms they follow maintain their force only through the aggregate assenting wills of themselves and their peers.

This description applies, of course, not only to tribal communities such as those in Tönnies’ favored armchair anthropological literature, but to the medieval German towns and cities in which he saw the full flowering of *Gemeinschaft*. The principal role of communal institutions, whether they were economic, religious, or political and civic authorities, was to provide embodiments and visible enforcers of the norms and values which kept communities from falling apart into competing classes, interest groups, or egoistic individuals. The *Gemeinschaft*-like towns of medieval Germany governed economic life very carefully, with the town councils, the guilds, and the church combining forces to maintain prices and quality standards for goods, and to warn against the risks of corruption through trade and commerce. Exchange was no matter for “enterprising individuals” but even in a small community of households was more analogous to a sharing of food at a common table, according to mutually agreed-upon standards rather than contractual relations.<sup>77</sup> The higher activities of the towns (that is, those that transcend the arrangements necessary for survival), meanwhile, involved those forms of art and handicraft designed to keep civic culture and a sense of one’s own duties constantly in mind, “in short, to bring lofty and eternal values closer to the senses.” Indeed, religious institutions and the arts had the central role in town life, since in the absence of kinship ties that encompass the entire population, they were the primary means of inculcating and

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<sup>77</sup> Ibid., 44-45, 33; *C&S*, 50-51, 41.

maintaining virtue.<sup>78</sup> The life of the mind was governed above all by the church, and like other communal powers, the norms governing intellectual endeavors were based on commonly affirmed authority: in science and philosophy, the preeminent position of Aristotle was unshaken for centuries.<sup>79</sup>

Under these conditions, the individual pursued his ends in an almost reflexive manner. The proper action in a given context was clearly set out by the inherited norms and the institutions embodying them. And indeed the very “will” of the individual—*Wesenwille* in *Gemeinschaft*—was naturally disposed to the carrying out of actions in an immediate, non-instrumental way, Tönnies claimed. Actions were, generally, to be taken for their own sake rather than out of calculation of possible outcomes.<sup>80</sup>

### **b) The Transition to Modernity**

In Tönnies’ account, as we have seen, in a certain implicit way the normative force of values even in community depends ultimately on the wills of biological individuals. They do not consciously see it this way, preferring to point to the authority of God, of custom, of “the Philosopher,” and so forth, which they regard as objective and normatively binding powers. And indeed, their beliefs grant legitimacy to tradition. But there is nothing inevitable about the top-down social values maintained by traditional societies; their perceived validity is in fact fragile. For individuals are moved by *Kürwille* as well as by *Wesenwille*, and since it is at base the predominant type of will that determines the nature of a given society,<sup>81</sup> *Gemeinschaft* can become *Gesellschaft*. Modern society may not be a perfect instance of *Gesellschaft*; like all existing social forms, it is mixed, and Tönnies believed that Germany in his own day was barely

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<sup>78</sup> Ibid., 42-43; C&S, 49.

<sup>79</sup> Tönnies, *Thomas Hobbes: Der Mann und der Denker*, 2d ed. (Leipzig, Zickfeldt, [1896] 1912), 63-65.

<sup>80</sup> Tönnies, “Zur Einleitung in die Soziologie,” 70.

<sup>81</sup> Tönnies, *G&G* 183; C&S, 165.

removed from “medieval barbarism,” as he wrote to Paulsen—but he added that *Gesellschaft* would be much more visible and indeed dominant by the late twentieth century.<sup>82</sup> It is clear that *Gesellschaft* was, for Tönnies, more or less identical with the condition of modernity in the process of unfolding, and that in modern life values and norms depended much more *openly* on the wills and desires of individuals.

*Gesellschaft* did not have the same sort of rootedness in natural, biological conditions as its more basic pair, making it for Tönnies less “real.” It was more “abstract” in two main ways: first, in that it tended to replace natural or intimate relations with purely formal ones, and second, in that it was itself a kind of tendency or “latent reality,” a potentiality rather than an actuality in the Aristotelian sense.<sup>83</sup> This potentiality could be seen as developing out of *Gemeinschaft* formations, and Tönnies sometimes equated it with a process leading to the decline or destruction of *Gemeinschaft*.<sup>84</sup> No problem exercised incipient German sociology more than the question of how the modern world evolved from pre-modern conditions, and Tönnies very much took part in the attempts to explain this process using his basic categories.

Like Max Weber, Tönnies envisioned a process of “rationalization,” and even more like Werner Sombart, he saw the growth of “rational” modes of thought and action as a generally *conscious* overcoming of traditional ways. At the end of his life, he remarked on his interpretation of modernization, “I always did see in the entire historical development since the middle ages the gradual setting free of rationalism and its increasing dominance as inherently necessary processes, and especially as processes of the human mind as will.”<sup>85</sup> This striving for

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<sup>82</sup> Tönnies to Paulsen, 12 January 1888, *T/P Briefwechsel*, 244.

<sup>83</sup> *Ibid.*, 60-62; *C&S*, 64-65. Tönnies here seems to relinquish his nominalist tendencies for a notion of a developing “essence” (*Wesen*) of society. His use of the word *Wesen* is sometimes realist in tendency. Niall Bond has argued that Tönnies’ *fundamental* approach to concepts is essentialist, an argument which is certainly mistaken in light of Tönnies’ view of concepts as “names,” whatever his periodic backsliding in practice. See Bond, 7, 101.

<sup>84</sup> Tönnies, “Zur Einleitung in die Soziologie,” 71; *Prelude to Sociology*, 82.

<sup>85</sup> “My Relation to Sociology,” in Tönnies, *On Sociology*, 6.



rationality often expressed itself quite explicitly in a rejection of the ways of *Gemeinschaft*, in a “struggle against custom [*Gewohnheit*] and the formation of custom,” and he claimed “that in reality the reasonable and free man will always guard himself against acting out of custom, and will rather always renew the investigation of the relationship between end and means.”<sup>86</sup> The picture of the evolution of society that Tönnies gave in his various writings was more complicated than this, but it is nevertheless striking to note how much weight he lent to the conscious actions of individuals and to the growth of instrumental or “means-ends” rationality.

It was not a matter of an occasional remark in a letter. At least as Tönnies conceived it during his pre-war writings, his view of modernization could be found most concisely stated in a 1913 essay he published in the first number of the Kiel *Weltwirtschaftliches Archiv*.<sup>87</sup> Here he noted that a proper understanding of the transition from the middle ages to the modern age required noting how the individualism that characterized *Gesellschaft* grew up “within,” “out of,” and “alongside” *Gemeinschaft*. In some ways, modernity was a direct outgrowth of the middle ages—a continuation of the pattern of expanding cities and commerce and gradual improvement in manners and quality of life—but in other ways it represented a revolutionary change and was directly opposed to the main currents of medievalism.<sup>88</sup> As we saw above, risks to *Gemeinschaft* can arise from “within” traditional society through the growing power of a ruler or class of rulers, and this was in fact what Tönnies saw in the early modern period. In the economic realm, for instance, it began with manorial lords taking an interest in the managing and productivity of their estates; in the political realm, with the prince increasingly seeking absolute sovereignty; in the moral-religious sphere, with the clergy increasingly inclined by their

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<sup>86</sup> Tönnies to Høffding, 14/19 October 1888, *T/H Briefwechsel*, 36. (Original emphasis, covering the entire passage, removed.)

<sup>87</sup> Tönnies, “Individuum und Welt in der Neuzeit,” reprinted in *Fortschritt und Soziale Entwicklung* (Karlsruhe: Braun, 1926), 5-35.

<sup>88</sup> *Ibid.*, 5.

rootlessness and lack of family to be individualists and to seek power through a monopoly over interpretation of society's guiding religious values.<sup>89</sup>

But there were also revolutionary tendencies “out of” *Gemeinschaft* that rejected the traditional social order rather than trying to gain a preponderance of power within it, which were motivated by attempts to free the individual from his traditional bonds. Here Tönnies seems to have been thinking of conscious efforts made by groups of individuals to strengthen economic individualism by weakening traditional agricultural and craft restrictions; to further political individualism through revolutionary struggles for rights and freedoms; and to acquire moral-spiritual freedom through rejection of church authority.<sup>90</sup> Finally, developing “alongside” *Gemeinschaft*, there was the merchant and trader, always an outsider and “stranger” moving between places and communities and trying to open up communication over wide distances (Tönnies put the Swiss, the Quakers, and especially the Jews in this context); while in political life, he pointed to the growth of organized international groups, including such strange bedfellows as the “republic of letters” and the industrial proletariat. In the moral-spiritual arena, of course, there was the growth of science.<sup>91</sup>

The account in this 1913 essay is too sketchy to be persuasive even on its own terms, but it shows the role Tönnies saw for the effects of *Kürwille* in the transition to modernity. Naturally enough, for someone as highly influenced by Marx as Tönnies was, pointing to the actions of individuals and changes in attitudes as driving forces in modernization was not sufficient. He devoted a study to tracing the effects of technology on society and social change.<sup>92</sup> And he stated in no uncertain terms that *trade*, particularly international trade, was the single most important

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<sup>89</sup> Ibid., 10-15.

<sup>90</sup> Ibid., 15-22.

<sup>91</sup> Ibid., 22-26.

<sup>92</sup> Tönnies, “Die Entwicklung der Technik,” (1905), *SSK II*, 33-62.

factor in bringing about *Gesellschaft*.<sup>93</sup> But it is worth noting that Tönnies remarked in the long and informative letter he sent to Høffding in 1888 explaining his views, that he was in historical viewpoint more than anything a follower of St. Simon and Comte, and that if Marx served as a useful correction to the one-sidedness of Comte's focus on intellectual development as the motor of history, Marx himself ought to have acknowledged the force of ideas. "I suspect however that that keen-witted man [i.e., Marx], if he had taken the occasion to go more deeply into the causal consideration of the historical process, would not in any way have disavowed the great complexity within which the different factors act upon one another, nor would he have neglected to appreciate the relative meaning of the intellectual moments [i.e., of intellectual factors]."<sup>94</sup> And in his "Selbstdarstellung," Tönnies noted that the development of capitalism could be seen as being as much a consequence of modern attitudes as a cause.<sup>95</sup>

### **c) Forms of Normativity in *Gesellschaft***

Tönnies' remarks on the transition to modern society have made clear how central he thought the individual striving for freedom from pre-modern restrictions in fact was. Personally, he was an opponent of economic individualism, the most "pure" expression of *Gesellschaft*, but he was in no doubt about its social-scientific importance or about its role in bringing about those elements of modern life that met his approval outside of (and often enough within) the confines of his scholarly writing. In order to complete our understanding of Tönnies' views on the nature of values as revealed by his picture of historical development, we turn next to the sources and forms of normativity in modern society.

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<sup>93</sup> Tönnies, *G&G* 63-65; *C&S* 66-67; "Historismus und Rationalismus" (1895), *SSK I*, 112-13; see also "My Relation to Sociology," 10.

<sup>94</sup> Tönnies to Høffding, 14/19 October 1888, *T/H Briefwechsel*, 42.

<sup>95</sup> Tönnies, "Selbstdarstellung," 230-31.

The section on Gesellschaft in *G&G* focuses intently on one particular facet of modernity: the market economy. If the characteristic feature of Gemeinschaft, out of which all its structures originated, was family life and kinship, then the prime exemplar of Gesellschaft, as Tönnies later recalled his intentions, was “the...business life, as it is identified in the most basic way through the economic fact of exchange and the corresponding legal fact of contract.”<sup>96</sup> And therefore, not surprisingly, if the source of guiding values in traditional societies expressed paternal authority of one kind or another, the source in Gesellschaft also reflected its paradigmatic social expression. That is, the values of modern man, ideal-typically and increasingly in reality, were those of free individuals participating in purely formal arrangements with others, without intimacy and in the pursuit of their own interests. Although the institutions of Gesellschaft ramified out from such market relations to embrace all other areas of social life, the market economy remained its lodestar.<sup>97</sup>

In economic life, the only true commandment, according to Tönnies, was “do or die.” He observed that once markets had suppressed the authority of traditional institutions that ordered production and exchange, such as the guilds and the church, there was only one choice: to strive against one’s competitors or to go under, something that was never envisioned even in cases of conflict in Gemeinschaft.<sup>98</sup> He saw market competition through the lens of the Hobbesian state of nature, portraying trade as if it were a virtual war and a zero-sum game; and he regarded any remaining moral rules as mere pragmatic conventions without any inner meaning to social actors, intended to keep citizens from killing one another if it suited their purposes.<sup>99</sup> Self-interest was raised to a virtue, and other moral virtues fell increasingly into desuetude. Meanwhile the

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<sup>96</sup> Ibid., 211.

<sup>97</sup> Tönnies, *G&G* 60-62; *C&S*, 63-64.

<sup>98</sup> Ibid., 193; *C&S*, 175.

<sup>99</sup> Ibid., 63, 286-88; *C&S*, 65; 255-56.

standard of value for goods became just as dependent upon self-interest as the standard for conduct. In a Marxist vein, Tönnies pointed to a shift in the nature of production from the skilled craftsmanship of traditional societies to the quintessential modern form of production of *commodities*. Instead of being crafted with care for one's own or the community's consumption, Tönnies asserted, commodities were produced as cheaply and extensively as possible with the sole purpose of "speculation" on the market that would further the pecuniary self-interest of the manufacturer.<sup>100</sup> Easily convertible into money, which was by definition a mere "means" to further exchanges without inherent value, these commodities themselves came to partake increasingly of the characteristics of money and thereby lost any innate qualities or value in themselves.<sup>101</sup>

As mentioned above, Tönnies thought that the legal contract corresponded in form to the economic exchange. Indeed, contracts were part and parcel of exchange, as trading now took place between individuals suspicious of one another and out for their own gain who required some third party—the law as enforced by social authority—to replace the customary rules regulating economic life in *Gemeinschaft*. Drawing on Sir Henry Maine's famous notion of a shift in legal thought from "status" to "contract," Tönnies described the replacement of the customary law based on the immemorial authority of tradition with the concept of a formal compact between two interested parties, whose validity—and normative heft—was determined only by its success in allowing free economic exchange to occur. Legal rules increasingly came to rest on a presumption that individuals were members of groups by voluntary association more than by birth, that such members could therefore determine the rules of their conduct, and that

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<sup>100</sup> Tönnies, "Historismus und Rationalismus," 113-22. Note, again, that Tönnies ignored the issue of consumer valuation of goods, or assumed counterfactually that ordinary people preferred traditionally produced goods to mass produced (and cheaper) goods. Subjective valuation of economic goods in a marginalist mode was no part of Tönnies' conviction that the source of valuation or evaluation lay in individual subjectivity.

<sup>101</sup> Tönnies, *G&G* 53; *C&S*, 58.

the role of social authorities was to be *neutral* enforcers of competing claims according to the formal adherence to agreed-upon rules of procedure.<sup>102</sup> The law of property, too, reflected a shift in the nature of property from possession (“*Besitz*”) to wealth (“*Vermögen*,” also having connotations of “means” or “power”), paralleling the shift from goods-for-consumption to commodities.<sup>103</sup> Again, Tönnies did not regard this portrait of legal change as purely schematic or ideal typical; he noted that it took place in both Roman antiquity and in the modern world in the revival of the Roman law and the spread of modern forms of natural law. These strong influences on modern legal systems promoted the growth of commerce and of individual freedom and *formally* equal justice, in both guises tending to erode customary law.<sup>104</sup>

Just as Hobbes had noted the need for a supreme state authority to enforce contracts, so Tönnies saw the modern state as having the source of its legitimacy not in the sanction of tradition but in its efficacy in furthering the interests of commerce. The state thus represented the values and enforced the norms preferred by those people who acted as “merchants,” whether literally working in commerce or simply (in an allusion to Adam Smith) reflecting the attitudes of the instrumentally rational pursuit of personal gain. Tönnies wavered between two ways of portraying the state: first, he depicted it in the way favored by the liberal tradition, as the result of an agreement between citizens to ensure not only peace and order but their rights and property, and subject to the requirements of natural law in its dealings with citizens.<sup>105</sup> Second, he employed, and seemed to prefer, the vision of the state favored by Marx, as the executive committee of the bourgeoisie. On this account, the state should be seen as being run by, and

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<sup>102</sup> Ibid., 54-55, 261-63; C&S, 59; 234-35; see also G&G 213/C&S 192 on the influence of Maine.

<sup>103</sup> Ibid., 208; C&S, 188.

<sup>104</sup> Ibid., 242-44; C&S, 218-19.

<sup>105</sup> Tönnies, “Zur Einleitung in die Soziologie,” 68-69; “Prelude to Sociology,” 79; G&G 264-66; C&S, 236-37.

having interests identical to those of, the capitalist “class.”<sup>106</sup> In this account, since the state itself possesses a monopoly in the use of force, it can make itself the interpreter of the natural law and thereby, “the state’s exposition of what the law is, amounts for [its] subjects to a declaration of what the law *shall* be....”<sup>107</sup> A form of normative authority is thus preserved above the naturally occurring whims and wishes of individual citizens, but this authority is also run by and in the interests of a “class” seen to overlap with those citizens—preserving a sense of its being an “absolute” authority only over the increasingly extensive and non-participating proletarian class.

In the spiritual and intellectual sphere, the standards of *Gesellschaft* are set increasingly by the two forces of science and public opinion, which together crowd out religion. For now, let us note that *Wissenschaft* could easily be seen as yet another factor contributing to the emphasis on the freely choosing individual in modern society as against the morally-bounded member of a community. Increasing knowledge, and increasing understanding of the means to achieve any given end, could serve to expand the desires of the unbounded individual even as it weakened the strength of religious doctrines that had had quasi-scientific content—thereby depriving the moral conscience of the individual of the traditional supports provided by religious authorities.<sup>108</sup>

Public opinion, for Tönnies, had close connections with the demystifying force of science.

“Public opinion aspires to lay down universally valid norms, not on the basis of blind faith but of clear insight into the rightness of the doctrines that it recognizes and accepts. In both form and orientation it is scientific and enlightened.”<sup>109</sup> Generated by the increasing prominence of free discussion in print and in person, public opinion came gradually to consider all aspects of social and moral life. The consensus assessment of practices, values, and people, spread through

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<sup>106</sup> Ibid., 264-67; *C&S*, 236-38.

<sup>107</sup> Ibid., 264; *C&S*, 236.

<sup>108</sup> Ibid., 181-82; *C&S*, 164.

<sup>109</sup> Ibid., 270; *C&S* 241.

newspapers and conversation, when “erected into general maxims constitutes a kind of moral code. It is, of course, a very variable code, depending on what are supposed to be the most advanced ideas, and it may encounter much opposition, but it is nonetheless strict in its prohibitions, condemnations and penalties. Since it is not concerned with the sentiments behind actions but only with formal correctness of procedure, it reacts only when rules are transgressed. Acknowledgement of positive worth is well-nigh impossible, because no more than strict adherence to the rules is either expected or desired.”<sup>110</sup> Concerned, like the institutions of exchange, law, and state, with formally correct procedure, public opinion could allow the free individual to pursue his ends with the minimum of interruption or hindrance so long as procedures were followed. And indeed, many areas of opinion became matters of indifference or taste, or simply another region of competitive struggle to enact one’s own wishes, as in the case of political opinions.<sup>111</sup>

With the major institutions of social life all promoting the values of the free and uninhibited individual, the decisions of the social agent were increasingly oriented toward the instrumental pursuit of his own ends. The social powers and the individual *Kürwille* thus reinforced one another in a spiraling motion towards an ever “purer” expression of *Gesellschaft*, and the instrumentally rational actor was stripped of even the *appearance* of objective guiding values imposed from outside by powers beyond his control which *Gemeinschaft* had once provided. Although Tönnies often suggested that both *Wesenwille* and *Kürwille* were “rational,” in discussions of *Gesellschaft* he also made it clear that “reason” in modern life meant no more and no less than *instrumental reason*, which could smoothly match the most effective means to a given end, but which was itself powerless to *determine* the proper ends to be pursued. *Kürwille*

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<sup>110</sup> Ibid.

<sup>111</sup> Ibid., 271; C&S 242.



thus took on the traits of instrumental rationality while *Wesenwille* increasingly embodied a mix of reason and emotion, or even pure emotion, as Tönnies occasionally portrayed it in unguarded moments.<sup>112</sup> Under modern conditions, then, to be a rational individual at all meant being skilled at determining the necessary means to an end without having any objective reason for pursuing that end—only subjective inclination or disinclination.

Tönnies drew several conclusions from this situation about the individual's orientation to action. It led, first, to a conceptual sharpening of the distinction between means and ends, as selecting the former became increasingly easy while choosing among ends became more difficult.<sup>113</sup> As technical knowledge grew, it led to increasingly large "chains" of means, as one step required another in sequence before arrival at the goal—contrasting with the more immediate pursuit of ends in traditional forms of action.<sup>114</sup> Many of the steps along this path might be unpleasant to the individual agent, and even when they were not actively so, they still appeared as necessary evils to be gotten through; as Tönnies remarked, for "Hobbes' people and their descendants in my Gesellschaft," ends and means are seen as "natural enemies, mutually exclusive and contradictory."<sup>115</sup> In these cases, "means and end confront each other as if they were strangers and of a different kind; and inasmuch as the one event is a movement which meets an impediment in the movement or position of the other, so that they obstruct each other, it can be said that their confrontation is essentially hostile. Their interaction consists in mutual mechanical coercion; to desire the end becomes the cause of the willing of the means—which is supposed not to be wanted spontaneously—so that the willing of the means becomes the cause

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<sup>112</sup> See "Das Wesen der Soziologie," 351; "Nature of Sociology," 89.

<sup>113</sup> Tönnies to Høffding, 7 May 1899, *T/H Briefwechsel*, 62.

<sup>114</sup> Tönnies to Høffding, 14/19 October 1888, in *ibid.*, 38.

<sup>115</sup> Tönnies, *G&G*, 141-42; *C&S*, 130-31.

that achieves the end.”<sup>116</sup> It was easy enough under these conditions to see not only particular actions but other people as merely steps along the long chain of actions required for the attainment of a goal, and thus instrumental rationality also had a tendency to introduce the treatment of others as objects or mere “stuff.”<sup>117</sup> Tönnies noted that from the perspective of *Wesenwille*, such actions would be judged negatively—but from the perspective of *Kürwille*, and from that of modern science itself, such a judgment cannot be made, and Tönnies explicitly declined to endorse this judgment of instrumental consideration of others as “evil,” however clear it is that he thought so as a personal matter.<sup>118</sup>

#### **d) Science and Tönnies’ Ambivalence about Modernity**

This modernization process, as Tönnies described it, yielded gains and losses. Tönnies did not hide his own views in *Gemeinschaft und Gesellschaft*, and there was much about the passing of *Gemeinschaft* which he lamented at a personal level. This could be taken as an implicit rejection of Tönnies’ own claims to objectivity or as evidence of his failure to achieve “value-freedom” in his own work; but it may just as well be evidence of the fact that for Tönnies, “objectivity is not neutrality.”<sup>119</sup> He did sometimes convey his own personal stance, but did not think that this affected the objective case made by his overall argument, for instance chiding Paulsen that he placed placed “too much weight on my evaluation [*Beurteilung*] of present things” and not enough on the caliber of the supporting arguments.<sup>120</sup> At any rate, what matters here is that Tönnies did not see modernity in a uniformly negative light.

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<sup>116</sup> Tönnies, “Zur Einleitung in die Soziologie,” 73-74; “Prelude to Sociology,” 84-85.

<sup>117</sup> Tönnies, “Das Wesen der Soziologie” 352; “The Nature of Sociology,” 90.

<sup>118</sup> Tönnies, *G&G* 136-37; *C&S*, 125-26.

<sup>119</sup> To use the title of an impressive collection of methodological essays by the historian Thomas Haskell: *Objectivity is Not Neutrality* (Baltimore: Johns Hopkins University Press, 1998).

<sup>120</sup> Tönnies to Paulsen, 12 January 1888, *T/P Briefwechsel*, 244.

For the growth of “rationalism” in individuals’ thoughts and actions which yields *Gesellschaft* also brings forth modern science. The same ability to observe acutely and passionlessly the “objective relations” of the surrounding world, and to represent them abstractly using ‘counters’ like money or concepts, leads to success in trade and in scientific research.<sup>121</sup> “The societal (*gesellschaftlich*) process is essentially one of rationalization, and shares fundamental characteristics with science. It elevates the rational, calculating individuals who use scientific knowledge and its carriers in the same way they use other means and tools.”<sup>122</sup> And just as the increasingly instrumental-rational orientation of individual action threatens traditional impediments to self-interest, so scientific knowledge threatens the basic beliefs of *Gemeinschaft*:

I have spoken already of the dissolving principle which lies in the pursuing of one’s own personal affairs, of which the chase after profit is but the most characteristic form. But the same individualistic standpoint is the standpoint, or at least the prevailing tendency, of science also. It is *nominalism* which pervades science and opposes itself to all confused and obscure conceptions, closely connected as it is with a striving after distinctness and clearness and mathematical reasoning. This nominalism penetrates into men’s supposed collective realities (supernatural or not), declaring them to be void and unreal... [except insofar as made up by individuals.] The spirit of science is at the same time the spirit of freedom and of individualistic self-assertion, in contradiction and in opposition to the laws and ties of custom—as well as of religion....<sup>123</sup>

Tönnies was an arch-rationalist and partisan of the Enlightenment, and so his vision of the nature of modern science displayed an ambivalence which was absent in his condemnation of economic liberalism and the effects he perceived it to generate. He was capable of going so far

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<sup>121</sup> Tönnies, *G&G* 54; *C&S*, 58.

<sup>122</sup> Tönnies, “Historismus und Rationalismus,” 111.

<sup>123</sup> Tönnies, “The Present Problems of Social Structure,” in *TG* 7, 1905-1906 (Berlin: de Gruyter, 2009), 279. This is the paper given by Tönnies at the Sept. 1904 Congress of Arts and Sciences in St. Louis. It may well have been written in English, in which Tönnies was fluent; at any rate, no German original has been preserved.

as to see scientific enquiry as merely one facet, alongside modern politics and economic activity, of a general tendency of “rationalism” to gain mastery (*Herrschaft*) over nature and other people through a process of abstracting, equalizing, and manipulating objects, making them fungible and interchangeable, in a way more evocative of Nietzsche or of Adorno’s and Horkheimer’s *Dialectic of Enlightenment* than of Tönnies’ other work.<sup>124</sup> But generally he extolled Enlightenment reason and its embodiment in modern science as a triumph over barbarism and religion.<sup>125</sup> There was an element of tragedy in the process whereby modernity shed its communal roots, but science, an outgrowth of that process itself, could help us observe this tragedy in a more or less stoic spirit.<sup>126</sup> Whatever our subjective assessments of the social world, science could help us achieve an objective understanding of it, and perhaps thereby help us alter it. As one of the distinctly modern powers, science necessarily reflected the influence of *Kürwille* and *Gesellschaft*.

### III. Values and Science

Tönnies was certainly not the first to present a narrative of the transition between traditional societies and modern societies by emphasizing the effects of increasing rationalization and individualization on norms and values. But he was first among the founders of professional sociology in Germany, preceding Simmel and Weber by a number of years, and helped to establish these as guiding preoccupations for the discipline. We have now seen that in Tönnies’ vision of the post-medieval West, the values that steer human action have increasingly been determined by individuals acting in their own interests and deploying their knowledge, power,

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<sup>124</sup> Tönnies, “Historismus und Rationalismus,” 110.

<sup>125</sup> Of many instances, see “Individuum und Welt in der Neuzeit,” 34-35; “Selbstdarstellung,” 230-31.

<sup>126</sup> *Ibid.*, 35.

and relations with others to advance these interests. Social norms and human institutions, from the rules governing economic exchange to the rules governing the population through state administration, are based in the modern world on the sovereign value of the free individual. This represents a substantial change from traditional beliefs which saw the individual as existing within a pre-established social order, governed by a hierarchical value system imposed from above and seen as permanent.

This picture of social change, and of the changing perceptions of human values that accompany it, is familiar today. But several aspects of it are worth noting if we are to understand the foundations of Tönnies' views on value-freedom in science. Tönnies places a great deal of emphasis on the actions of individuals in bringing about a *Gesellschaft*-like society: the drivers of change in his account are not mysterious social forces or laws of history, but the choices made by individual people. Related to this first point, and representing the central pivot of Tönnies' views on values, we have seen that even in a *Gemeinschaft* order, the validity and legitimacy of values depends on the assent of individual wills. Without this ultimately contingent assent, values would cease to have their normative heft. That is, even when seen by social actors as externally compelling, values are portrayed by Tönnies as rooted in personal acceptance and rejection—nothing more. Finally, Tönnies sees modern science as part and parcel of a world in which the individual is recognized as sovereign and the role of authority is explicitly questioned. Science, too, has moved away from its origins in contemplation, wonder, and devotion, toward an ideally passionless, means-oriented study of the natural and social worlds. It is closely connected with public opinion in jostling priests and prophets from their claimed authority and replacing churchly pronouncements with open (and open-ended) discussion of individuals' opposing views under an agreed-upon set of rules.

These observations help to make sense of seemingly conflicting statements which Tönnies made in the course of explaining his views during the value judgment dispute. Throughout his life's work, he consistently presented values as "subjective" in contrast to "objective" facts; and yet, he sometimes made statements suggesting that value judgments could gain a certain level of "objectivity." The riddle is solved when we distinguish between two meanings of "subjective." On the one hand, the term may suggest that values are selected by the individual person or subject in a way which is *not universally compelling* (as they would be, e.g., if commanded by an eternal and unchanging God or reason). On the other hand, it may mean that they are selected by the subject in a way which is *groundless*, in the sense that the selection is made on the basis of an arbitrary preference or decision. In the former case, it may still be possible to identify areas of intersubjective agreement which can achieve a certain level of intersubjective or purely human "objectivity" for a given individual under specified conditions, while in the latter case, it is not.

Tönnies' contention that the normative force of values rests in the individual subject's will in either *Gemeinschaft* or *Gesellschaft* *could* theoretically be consistent with either of these meanings of "subjective." For instance, even in the absence of a universally compelling justification for a given value—again, say, that its validity is guaranteed by the will of God or by a rational argument that holds for any rational creature—it might be the case that human beings are so constituted that they will as a matter of fact all regard the given value as valid. Interestingly, Tönnies considers this first possibility in his main explicit contribution to the value judgment dispute in 1912. But before we come to that, let us note that the main trend in Tönnies' thinking about values from his earliest publications onward indicates he held the *second* possible meaning as the main one. Values were subjective in the sense that they were the

result of a choice made on the basis of caprice, of liking or dislike: Tönnies was in ethical terms an emotivist.

### **a) Early Views: Value Subjectivism and Science**

As this dissertation argues, the advocates of value-freedom in the German social sciences adopted different parts of the value-freedom complex for different reasons. In Tönnies' case, the conviction that values were at base a matter of non-rational emotional and volitional commitment led him to believe that a fully rational, modern (social) science could not generate normative statements or imperatives for action and that the theory/practice distinction must consequently be carefully observed. Tracing the roots of Tönnies' views on the subjectivity of values is consequently of use in understanding what the phrase value-freedom meant to him and the nature of his commitment to it.

The intellectual-historical sources of his views differentiate him in part from his fellow advocates of value-freedom. As we have seen above, he was not persuaded by neo-Kantianism of the logical importance of the naturalistic fallacy of confusing Is and Ought or deriving the latter from the former. Unlike many of the economists considered in the previous chapter, Tönnies' conception of economic value was essentially classical (or, really, Marxian), and thus did not open a window onto the riotous world of purely subjective consumer preferences in which a good had no inherent value independent of the wishes and desires of the population. Indeed, Tönnies' understanding of value in the economic sphere as based on cost and especially labor alone was more or less at odds with his insistence on the source of normative evaluation in the individual will—one of the areas of inconsistency in his thought.<sup>127</sup> Nor were his views on

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<sup>127</sup> For instances of Tönnies' belief that the economic value of a good can be objectively determined by attention to the amount of labor required to produce it, see *C&S*, 54; Tönnies to Paulsen, 15 January 1889, in *T/P Briefwechsel*, 260-63 [Tönnies does not seem to have been persuaded by Paulsen's recounting one of the obvious objections to the labor theory of value in his reply of 18 January].

the subjectivity of values given important stimulus by the literature of legal positivism, despite his interest in law in the 1880s, as was the case for scholars like Jellinek and Radbruch.<sup>128</sup>

Rather, in his thinking on law as on society more generally, Tönnies was profoundly marked by seventeenth-century literature. We saw above (in Section I) the claim that Tönnies' interest in natural law was one of the factors that purportedly kept him from endorsing the idea of value-freedom. He was indeed fascinated by natural law thinking, but not, *pace* Sibylle Tönnies, because it provided a presumed instance of normative science—quite the opposite. As he argued in a brief 1911 article on the relations of sociology and legal philosophy written just at the time of the *Werturteilsstreit*, “the lasting significance of natural-law legal philosophy lies in the detachment of the concepts of law from theology; in the claimed autonomy of the human will also in the matters of the morally and politically valid social values.” Thus, he added, more or less following the later Rudolf von Jhering, whose attempted “renewal” of natural law he had studied closely in the 1870s and 1880s, “the *true meaning* of rationalistic natural law lies in the gradually pervading separation of the theory of law from the theory of morals: in the knowledge that law-establishing reason is and must be essentially utilitarian,” and must weigh and balance “conflicting interests” and “opposed elements” of society. “The natural-law legal philosophy does not intend to present in detail a law valid for all times and places, but rather only to lay the foundation of all law, under the presupposition of general personal freedom and abstracting from all ethical claims and duties between people,” a goal that, Tönnies added, had to some extent been achieved in modern private and public law.<sup>129</sup> The seventeenth-century and Enlightenment

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<sup>128</sup> See below, Chapters 4 and 5, for the ways in which this school of thought contributed to Jellinek's and Radbruch's views on values and value-freedom.

<sup>129</sup> Tönnies, “Soziologie und Rechtsphilosophie,” in *SSK II*, 169-170, first published in *Archiv für Rechts- und Wirtschaftsphilosophie* 4:4 (1911). The oddity of the attempted equation of natural law with utilitarianism is explained by seeing the pattern of natural law thinking as a stage in the development of modern legal thought, and by Jhering's efforts to enlist natural-law patterns of thinking in the fundamentally utilitarian, interest-balancing theory he advanced in his later career. For more on Jhering, see below, Chapter 4.



natural law tradition was essentially a stage in the development of a modern secular law appropriate to Gesellschaft, with its open individualism and absence of any claim at overarching norms—not, for Tönnies, a source of objective normative validity.

Above all, it was Thomas Hobbes who served as the principal driver of Tönnies' nominalist and emotivist commitments. His early article series, "Notes on the Philosophy of Hobbes," concentrated principally on Hobbes' theory of science, setting him in what Tönnies argued more or less originally was the proper context of Galilean and Cartesian natural science and the tendency toward the employment of a "geometric" method in studying human as well as natural phenomena.<sup>130</sup> Explaining Hobbes' nominalistic procedure of refusing to accord "reality" to the "names" human beings assign to the matter-in-motion that presents them with the uncertain appearances given in experience, Tönnies noted that Hobbes was essentially led to a position of separating certain knowledge of purely analytic truths (relations between "names" or "concepts" [*Begriffen*]) and uncertain knowledge of synthetic truths (the perceptions of experience).<sup>131</sup> It is easy to see how Tönnies' own emphasis on the elaboration of conceptual typologies of pure sociology, and refusal to confuse pure types with the concrete phenomena of experience they were designed to explain, unfolded from his detailed explication of Hobbes' efforts to keep names and things rigidly separate.<sup>132</sup> Important as this aspect of his reception of Hobbes is for Tönnies' methodology, in the impetus toward type-building it lent him and in its role as inoculation against reifying collective concepts like "society," what is most of interest for our purposes is Hobbes' emotivism. After describing Hobbes' view that we can consider judgments of "good" and "bad" as generated by the motions of attraction or aversion with which

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<sup>130</sup> Tönnies, "Anmerkungen über die Philosophie des Hobbes," *Vierteljahrsschrift für wissenschaftliche Philosophie*, Vol. 3 (1879), 453-66; Vol. 4 (1880), 55-74, 428-53; Vol. 5 (1881), 186-204.

<sup>131</sup> *Ibid.*, Vol. 4, 58-59.

<sup>132</sup> For a mere sample of Tönnies' nominalism, and treating of concepts as tools rather than as merging with or fully adequate to reality, see e.g., *C&S*, 7; "Wege und Ziele," 62, and "Soziologie und Rechtsphilosophie," 170.

the human subject confronts stimuli, Tönnies suggests that Hobbes' argument is "the first attempt to carry over to the moral arena that opposition to teleological dogmatics which rational physics had made possible."<sup>133</sup> His lasting meaning for the realm of morals is the opposition to the "medieval worldview" occasioned by his "eliminating" the "objective reality of the *moral* qualities."<sup>134</sup> The acting person is moved, then, not by "a specifically human, essentially *intellectual* or rational process, but rather one pertaining to the animalistic life as such or to a pure process of *will*: a changing play of affects."<sup>135</sup> Although these articles were simply an interpretation of Hobbes' work rather than an endorsement, the residue of Hobbesian modes of thinking is visible throughout Tönnies' work.

The debt was easily apparent in his earliest sociological writing. At the same time Tönnies was completing his first series of studies on Hobbes, he was working on the brief but dense and convoluted first draft of *Gemeinschaft und Gesellschaft*. Delivered to the faculty of the University of Kiel in 1881 as Tönnies' habilitation, it was turned down in favor of his Hobbes studies, as noted above. Although even Paulsen gently criticized it as obscure, and although it contained little of the historical or developmental storyline that marks the book he published six years later, it does provide an early window into Tönnies' emotivism and value-subjectivism, and his thinking on the proper "relations" between values and science.

One of the most remarkable things about the document is the regular use of the words "values" and "value judgment," not at all in common parlance in 1881 in their modern meanings. It is not entirely clear from what source Tönnies drew the terminology. The term "value" or "values" was used in a non-economic sense, if sparingly, in works by Nietzsche that Tönnies had read, such as the 1878 *Human, All-Too-Human*. It had been used by the philosopher Hermann

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<sup>133</sup> Ibid., 437.

<sup>134</sup> Ibid., 440.

<sup>135</sup> Ibid., 441.

Lotze, who was highly regarded by Paulsen and with whom Tönnies tried to develop a relationship in Berlin.<sup>136</sup> And it may have been used by the logician Christoph Sigwart, with whom Tönnies studied philosophy at Tübingen without reporting any particular enthusiasm for his lectures.<sup>137</sup>

But regardless of the source, the draft not only showed Tönnies' early familiarity with the notion of "values"; it also demonstrated that he had not just assimilated Hobbes' emotivism but been persuaded by it. The very structure of the text is reminiscent of Hobbes' catalogue of the passions, virtues and traits of human psychology in the first part of the *Leviathan*: it is an extended exercise in the definition of "names." Tönnies' position on values is laid out clearly. In contemplating the spread of the practical philosophies of the ancient schools of thought, he noted that these schools would probably have resisted the realization that "most of the power" of their ideals "is created not out of common thoughts, but out of common feelings or tendencies of will [*Willensrichtungen*], and they [the ideals] must prove themselves therein. In reality, however, it is like this: anyone may claim that one's 'own' is *better* than something foreign; but the category of *truth* finds no use here, as the category of 'good' finds none in pure science. The one possible argument for the *objective* value of a philosophical life-ideal was that which Plato attempted to give in the Republic, B VII. But its weakness characterizes the undertaking."<sup>138</sup> Attempts at establishing "objective" values were doomed to failure; the categories of truth or falsity were misapplied to questions of values, which could not be said to be objects of *knowledge per se*. How were values grounded, then, if not in reasoned knowledge? "We are not

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<sup>136</sup> Tönnies, "Selbstdarstellung," 206. Tönnies and Paulsen wrote of Lotze in their correspondence only briefly, at the time of his death, which did nevertheless follow close on the completion of the draft of *G&G* in 1881; see *T/P Briefwechsel*, 131-35.

<sup>137</sup> Carstens, 69.

<sup>138</sup> Tönnies, "Gemeinschaft und Gesellschaft: Theorem der Kulturphilosophie. Entwurf 1880/81," in *SSK I*, 1-33, here 5.

content to understand the human [*das menschliche*],” Tönnies argued, “but rather, like everything that concerns our volition [*Wollen*], we wish to know and to judge its *value*. What can this involve?” Using Hobbesian language, he answered, “In life, things and their motions [*Bewegungen*] draw near to us and arouse pleasure and pain in us; accordingly, we judge them in diverse ways and say that they please or displease us.” The assessment of values—including aesthetic and ethical values—is carried out by each individual according to a subjective calculus of attraction or aversion based on the sensational and emotional impact of the things human beings evaluate.<sup>139</sup>

Tönnies suggested in this early manuscript that he was in pursuit of “philosophy” conceived as a general cultural science that would provide a “worldview” for its adherents. It has been maintained that this goal indicates Tönnies’ fundamental divergence from Max Weber and other adherents of value-freedom.<sup>140</sup> But Tönnies explicitly observed that in “this modern age” with its multiplication of diverging life-ideals, philosophy, “insofar as it is pervaded by an ideal, may even under other favorable conditions find admission only among similarly-thinking and well-prepared minds.”<sup>141</sup> This was hardly an endorsement of a normative “science” of philosophy. And much more interestingly, this philosophy, as Tönnies described its role, had features that anticipated both Weber’s conception of the ideal type and his argument that science could help clarify value-positions by examining their internal structure and consistency.

If, Tönnies suggested, value judgments express purely internal feelings of pleasure or pain in the individual and cannot be assessed by others as to their reality, then the cultural scientist must acknowledge that the nuances of particular subjective *feelings* will not be captured as generally or universally as nuances of *thoughts* (which are more easily subject to agreement as

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<sup>139</sup> Ibid., 7.

<sup>140</sup> See, e.g., Bond, “Sociology and Ideology,” 92.

<sup>141</sup> Tönnies, “G&G: Theorem der Kulturphilosophie,” 5.

in nominalistic definitions).<sup>142</sup> The appropriate method for the scientist intending to understand and assess a particular instance of human valuation, whether in history or in contemporary society, is then to attempt a thinking through of his own value judgments on the same matter as his subject through self-reflection, and follow it up with a comparison (*Vergleichung*) using the “rules of thought.” He faces a fourfold task: first, he must conceptually stabilize his own value-judgments about the objects of his thought so that they lose their hazy outlines and take a clear form. Second, he must see what most basic values, or “final values,” correspond to and direct these judgments in his own mind. Third, he must determine the possible systematic connections between his various final or ultimate values, and between these ultimate values and the various value judgments he makes, assessing the entire value system for its coherence. Finally, he will then be able to appraise the individual objects that his value judgments refer to, bringing him back in a circle to the first step. The purpose of this procedure for the scientist is ultimately to identify and describe a pure, fixed, and consistent ethics that can be used—ideal typically—as a heuristic device against which to compare actual value judgments made by people. This philosophical account is no normative science of values, but rather a neutral model for the assessment of value choices.

It is not only fascinating to see one of the most famous features of Weber’s position on what science can tell us about our values anticipated in this unpublished text from 1881; it also demonstrates that Tönnies had a commitment to value-freedom early on. Even if Tönnies did not publish the document until the first volume of his *Soziologische Studien und Kritiken* collection appeared in 1925, he had expressed some of his views clearly in print in the preface to *Gemeinschaft und Gesellschaft* when it appeared in 1887:

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<sup>142</sup> The following account is drawn from “G&G: Theorem der Kulturphilosophie,” 9-11, and the excellent reconstruction in Merz-Benz, *Tiefsinn und Scharfsinn*, 236-39.

Much effort and practice are required, perhaps even a natural bent for cold reasoning, to study the facts of history with the same detached attitude with which a natural scientist pursues the life processes of a plant or animal. And even a learned and critical public does not as a rule want to be told the view of an author about how things are, how they came about, and how they will turn out; they would much rather hear how he thinks they *should* be. We are used to seeing facts organized according to certain premises, and this may be up to a point inevitable, but people fail to see that deliberate avoidance of this pitfall is what forms the scientific habit of mind. We expect and almost encourage the opinionated and violent rhetoric of an interested party instead of the calm and composed logic of the unbiased observer. Thus in modern *social science*, and especially in Germany, a struggle is being waged about the implications of underlying theory. We may well accept this as being a reflection of conflicting currents in debates on policy and legislation, through which the representatives of rival interests and classes may claim with greater or lesser sincerity to speak on behalf of opposing convictions and doctrines.... These differences may sometimes come from a deeper source in the moral sensibilities and inclinations of those who represent them, but even so, like other passions, these feelings should not be allowed to distort an objective view of things.... We must situate ourselves completely outside the things we are examining and observe bodies and movements as if with telescope and microscope.<sup>143</sup>

Here we have an early statement that should long ago have been recognized as pathbreaking.

### **b) Tönnies' Contributions to the *Werturteilsstreit***

We now have a full context for the documentation, explication, and critique of Tönnies' views on freedom from value judgment, which will draw upon the writings and letters he produced during the controversies in the Verein für Sozialpolitik and the Deutsche Soziologische Gesellschaft between 1910 and 1914. As far as Tönnies was concerned, there was no conflict between these two organizations, and he did not see his continued participation in both as

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<sup>143</sup> Tönnies, *G&G*, xxv-xxvi; *C&S*, 10.

problematic in any way; he rejected the argument of the economist Julius Wolf that the founding of the DGS would lead to a loss of credibility for the Verein as its policy studies would increasingly look tendentious in comparison.<sup>144</sup> But he left no doubt that if he had to take sides on the matter of value judgments, he would stand with Weber: when the latter resigned from the DGS executive board in 1912 over what he saw as a hopeless abuse of the bylaw against the expression of value judgments in scientific discussion, Tönnies wrote to Simmel, Sombart, and Hermann Beck that “we are all, indeed, on his side in the matter.”<sup>145</sup> Tönnies had clearly demonstrated this, as we saw above, in his opening lecture at the first DGS conference in 1910. He wished to keep the peace between the factions—between the “committed” and the “value-free,” as it were—but the internal logic that grew from his fundamental emotivist assumptions led him toward Weber, whatever hopes of reconciliation he sometimes expressed.

The first DGS conference itself generated controversy over the value-freedom criterion, and in responding to complaints lodged by Hermann Kantorowicz, Tönnies provided as clear a statement of his continued adherence to emotivism, and its origins in Hobbesian nominalism, as could be wished: “We [the DGS] have placed ourselves on the nominalistic—if not also the theological-nominalistic—standpoint: the good and the right are always determined in the last resort by (human) ‘*will*,’ that is by *feelings* and *purposes* [*Zwecke*], which according to their nature are not general and necessary, as is everything known through reason.”<sup>146</sup> From this basic starting point, Tönnies would move in two directions: one toward Weber and the DGS, one toward Schmoller and the Verein.

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<sup>144</sup> This is the burden of Tönnies’ principal published contribution to the *Werturteilsstreit*, the open letter “Die neuesten Angriffe gegen den Verein für Sozialpolitik,” originally in *Schmollers Jahrbuch* 36:1 (1912), 6-9; reprinted in *TG* 9, 237-41.

<sup>145</sup> “Wir alle stehen ja in der Sache auf seiner Seite.” Tönnies to Simmel, Sombart and Beck, 27 October 1912. GStA PK, VI. HA, NL Sombart, Nr. 18b.

<sup>146</sup> Tönnies to DGS Vorstand, 2 Nov. 1910. NL Tönnies, 61:1.1.54A. All emphasis in quoted letters (generally underlining) is original unless otherwise noted, and is represented here by italics.

The path that led toward Weber began by registering that if values were at base founded only on emotion and will, then there could be no scientific determination of their validity. Continuing his post-conference remarks to the DGS executive board, Tönnies noted that “Discussions of the methods for knowledge of, for the ‘science’ of, the good and right are thereby *excluded*. We have accepted that such things are not *possible* without subjective judgments of feeling, taste, and partisanship. And so it is, certainly. In such things, the more or less ‘hot-blooded’ [*temperamentvollen*] *personalities* are operative, not the more or less cool-blooded [*temperamentlosen*] brains.” It was perfectly possible to *discuss* different tendencies of thought without choosing among them, but no discussion of claims to a purported “*Normwissenschaft*” was to be permitted.<sup>147</sup> Indeed, when Tönnies later presented his own preferred formulation of the idea of value-freedom, it was not that of “the exclusion of all value judgments,” but ““limitation to theoretical discussion, sharp demarcation against all practical disciplines *making claim to normative validity*.””<sup>148</sup> He held any prospect of a universal scientific system of values, with a claim to normative validity for all, to be impossible; discussion of such things was itself inherently unscientific.

The reason for placing debate about *Normwissenschaft* outside the pale of science was that it was psychologically impossible to make claims on its behalf without being directed by one’s own feelings and partisanship: by what one preferred. This was an instance of Tönnies’ favored injunction against confusing what “is” with what one “wants,” which he employed instead of resting his case on the philosophical distinction between “is” and “ought.” Not just in methodological discussions like the one over value-freedom and *Normwissenschaft*, of course, but in all social scientific work, he thought that one should aim for dispassion in studying social

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<sup>147</sup> Ibid.

<sup>148</sup> Tönnies to Simmel, Sombart and Beck, 27 October 1912. NL Sombart, 18b. (Emphasis mine.)



phenomena, acknowledging the difference between one's preferences and reality—"one of the hardest tests of the purity and rigor [*Strenge*] of theoretical consciousness."<sup>149</sup> As he would put it in an undated manuscript written sometime after 1920, "inasmuch as I observe, research, think, I have no wish nor will that things may be or become anything other than what they are."<sup>150</sup> There was, of course, a clear model for this attitude to be found. In his opening speech at the DGS, he echoed his early remarks on emulating the natural scientific attitude in the first preface to *G&G*, lamenting that "the idea of wholly theoretical insight, of the study and observation of the social operations of our environment as if they were operations of a moon and mean nothing to us, and the idea of the study and observation of human passions and strivings as if they were the angles of a triangle or calculable curves, is still seen as being foreign to the public service aspects of our discipline."<sup>151</sup>

Tönnies' view of objectivity was thus the older, "ascetic" version, calling for the exercise of restraint and scholarly virtue, rather than the newer version guaranteed by procedures for challenge and validation by the scholarly community, as it appeared in Weber or, as we will see, in Jellinek. Tönnies was not naïve, recognizing the impossibility of eliminating one's own feelings entirely.<sup>152</sup> "Interest and prejudice falsify the knowledge of the facts just as strongly as they influence value judgments," he noted.<sup>153</sup> And he recognized as well the fact that there were powerful *outer* as well as inner pressures on scholars to put the mantle of objectivity aside and engage in scholarly work with an explicit "agenda." In a letter to Sombart in 1907, for instance, Tönnies had expressed dismay over the continuing lack of acknowledgement of his work by

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<sup>149</sup> Tönnies, "Sinn und Wert einer Wirtschaftsphilosophie," *SSK II*, 108.

<sup>150</sup> Fragmentary manuscript labeled by Tönnies "Wirtschaft. Politik. Geist," and by another hand, "Werturteilsfreiheit. Wissenschaft als Beruf." NL Tönnies, 34:66, p.3. Can be dated to post-June, 1920 period by reference to Weber's death.

<sup>151</sup> Tönnies, "Wege und Ziele," 59.

<sup>152</sup> *Ibid.*, 59, 62.

<sup>153</sup> Tönnies, "Die neuesten Angriffe," 239.

leading social scientists, wondering "...is it merely the punishment for my outer objectivity [*Objektivität*], that I'm nearly always treated as if I weren't there [*dass ich doch fast immer wie Luft behandelt werde*]?"<sup>154</sup> But he did not address the core philosophical question raised by Baden neo-Kantianism, the question of the inherent role of values in the very selection of any problem or topic for research in the human sciences. Cornelius Bickel has pointed out that Tönnies' self-proclaimed nearness to Anglo-French "positivism," in opposition to the German tradition of implicitly relativistic historicism, led him to neglect the philosophical problems raised by the German tradition about the hermeneutic component of the human or social sciences.<sup>155</sup> He thereby failed to address the very issues which led Windelband and Rickert to their own consideration of the role of values in historical and social scientific methodology, which we examined in Chapter 1.

Lack of engagement with these concerns was a major point of difference between Tönnies and Weber. However, it reflected the absence in Tönnies of a sustained confrontation with some deep methodological issues rather than a substantive difference in opinion regarding the adequacy of the value-freedom criterion. Far from leaving open the possibility or probability of a future normative science of sociology, as Klaus Heberle has claimed,<sup>156</sup> Tönnies' psychological reformulation of the Is/Ought distinction into "Is/Wants," in conjunction with his conviction of the subjectivity of values, meant that the social scientist was *always* obliged to keep the study of social reality separate from the projection of preferred social arrangements. Since Tönnies had started from the premise that the values guiding one's will (or wants) derived from non-rational sources that could never be made universally binding, it was impossible to shift this position in mid-argument and claim that there was in fact a basis for scientific

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<sup>154</sup> Tönnies to Sombart, 2 April 1907. NL Sombart, Nr. 9f.

<sup>155</sup> Bickel, *Ferdinand Tönnies*, 24-25, 94, 171-74.

<sup>156</sup> See above, section 1.

prescription. This, in turn, meant that Tönnies could readily agree to the final element of Weber's position: the social scientist was not to promote or condemn the setting of any particular policy goal or policy proposal on the claimed basis of his scientific authority.

Insofar as a man was a sociologist, and not a *Sozialpolitiker*, wrote Tönnies in 1912, he “has as a matter of principle nothing to do with practical, that is, with political tasks. He will *exclusively* address himself to theoretical problems. That is, he not only does not presuppose that something is desirable [*wünschenswert*] or not, but rather does not concern himself at all with the question of desirability.”<sup>157</sup> He was certainly permitted, indeed encouraged, to study social problems that were perceived to need remedying, but without endorsing particular practical conclusions: “but he abstains from drawing any implications from the results,” remaining an anatomist rather than a doctor respective to the “social body.”<sup>158</sup> Tönnies thus endorsed the theory/practice distinction as the core element of value-freedom. Not only in his DGS address but in a publication in *Kunstwart* shortly thereafter, he remarked of sociology that “it will be exclusively theoretical and not at all practical. It will know and understand the phenomena of social life, not master or reform them, not even in the form of teaching how one can master or reform them. Such a separation is necessary today precisely because of the massive expansion of efforts setting out from reform and renewal of institutions and orders.”<sup>159</sup> Tönnies endorsed this view in person as well as in print, attempting to ensure that it was enshrined in the DGS of which he remained president. We observed above, for instance, that in 1914 the executive committee allowed the creation of a “social-biological section” of the association at the behest of Alfred Grotjahn, a noted eugenicist. Tönnies, explicitly reminding his fellow committee members of their common agreement on the principle of value-freedom, remarked “that the executive board

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<sup>157</sup> Tönnies, “Die neuesten Angriffe,” 238.

<sup>158</sup> Ibid.

<sup>159</sup> Tönnies, “Soziologie als Wissenschaft und die Deutsche Soziologische Gesellschaft,” in *SSK II*, 145.

can only grant its approval if ‘racial hygiene’ and ‘eugenics,’ as practical-scientific efforts, remain strictly excluded from the program.... Naturally, this is not to render judgment on the significance of these tendencies. They belong, however, necessarily in another framework, inasmuch as *Sozialpolitik* remains outside of our social and political research.”<sup>160</sup>

If all this represents Tönnies’ “path” toward Weber’s position, then his path toward Schmoller, as it were, began on the other hand with Tönnies offering a caveat to his own emotivism. Even at his most conciliatory, it must be stressed, Tönnies continued to assert emotivist premises; in his contribution on the value judgment dispute to *Schmoller’s Jahrbuch*, he stated in no uncertain terms: “That a ‘purpose’ is desirable, will however in the strict sense never be provable.”<sup>161</sup> In the strict sense: that is, rationally, definitively. But Tönnies thought he had found a way in which a compromise might be sought. He suggested that the cleft between subjective value judgments and objective theoretical judgments was not as “absolute” as had been recently proclaimed (presumably referring to Weber and Sombart). For, he observed, there were areas of widespread agreement on values in a given society. Indeed, there were cases in which it was easier to gain agreement on a question of values than a question of fact: for instance, he said, it was easier to reach complete unanimity on the principle that forcing workers to join a union against their will was wrong, than on the interpretation of a given case as an instance of compulsion in fact.<sup>162</sup>

Tönnies claimed therefore that both objective theoretical judgments and subjective value judgments can be said to hold under conditions of a general level of comparability in the mental

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<sup>160</sup> Tönnies to DGS Vorstand, 3 March 1914. NL Sombart, 18b. Although Grotjahn thought Tönnies’ claim not to render judgment disingenuous, which it may have been in Grotjahn’s case, Tönnies himself held rather favorable views of eugenics—once out of scholarship and in the realm of social policy.

<sup>161</sup> Tönnies, “Die neuesten Angriffe,” 238. [“Dass ein ‘Zweck’ wünschenswert sei, wird sich allerdings in strengem Sinne niemals beweisen lassen.”]

<sup>162</sup> *Ibid.*, 239.

constitution of human beings, whether of the “organs” of knowledge or of feeling and will. That is, there is a certain range of “normal” mental functioning for human beings, in both the areas of value judgment and factual judgment. A given judgment, whether it is one of fact or of value, may be seen therefore as objective or subjective, or even valid or invalid, depending on whether it is in accord or in disaccord with the normal area of functioning:

Objective theoretical judgments too are valid only under the presupposition of a general human (that is to say, identical) composition of the organs of knowledge. Subjective value judgments too can be raised up to a comparable level of objectivity [*Objektivität*] with a general human (that is to say, identical) composition of the organs of feeling and will. In one case as in the other there are physiological-normal compositions of these organs and in contrast pathological-abnormal compositions which *necessarily* lead respectively to correct and valid or to false, that is, invalid, merely subjective judgments of the one or the other kind [i.e. theoretical or practical].<sup>163</sup>

Under these conditions, practical disciplines like medicine and Sozialpolitik could quite legitimately lay claim to be pursuing scientific knowledge, even though they definitionally presupposed certain value-oriented goals (health, and the improvement of social conditions, respectively).<sup>164</sup> The Verein für Sozialpolitik was therefore fully justified in being a scientific organization devoted explicitly to social policy in all its obvious value-ladenness: “The Verein für Sozialpolitik need not occupy itself at all with the objectification [*Objektivierung*] of value judgments; it can hold to certain fixed [*feststehende*] objective value judgments, and these too need not be claimed as generally valid if it simply makes the invocation: ‘I stand or fall with this, my presupposition, which however includes within itself an abundance of value judgments.’ The Verein has in fact never denied that it is in this regard ‘partisan’; whoever is *against Sozialpolitik*

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<sup>163</sup> Ibid., 238-39.

<sup>164</sup> Ibid.; “Wege und Ziele,” 61.

does not belong in it.”<sup>165</sup> Hedged though this statement is, its overall intent is to justify the legitimacy of the Verein in its claims to represent a science of social policy.

How can we reconcile such claims with the position we saw Tönnies adopt above? The two positions appear to be in contradiction: either a genuinely normative science is possible or it is not. What has happened is that Tönnies subtly—and presumably unconsciously—redefined the meanings of “subjective” and “objective” in the course of his position paper in *Schmollers Jahrbuch*. From Tönnies’ standard emotivist definition of “subjective,” he has shifted to the meaning of “in disaccord with the average views of the relevant human group,” while “objective” has come to mean “in accord with the average views of that group.” A further problematic feature of Tönnies’ attempted conciliatory move is that he did not define the extent of human group: is it the set of all functioning human beings? Is it culturally, socially, or temporally specific? Moreover, within the group, however defined, Tönnies seemed to believe that it is relatively easy to determine what the “objectively” (or, in more recent terminology, intersubjectively) valid value judgments are. But he gave us no reason for this claim beyond his mere assertion, and a few examples—condemnation of a newspaper’s allowing its editorial line to be “bought” by a business interest, for instance, or the moral superiority of the claims of labor against capital—which can hardly be seen as uncontentious.<sup>166</sup>

It is also worth mentioning that his “normal functioning” argument runs the risk of landing Tönnies in the terrain of *cognitive* as well as value relativism since it involves a re-definition of rationality as conformity to contingent standards of a given human community. And given Tönnies’ picture of the development of modernity and modern science, his attempted equation of value judgments and factual judgments as both functions of intersubjective

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<sup>165</sup> Ibid., 240.

<sup>166</sup> Ibid., 239.

agreement must fail—for, according to his account, as scientific judgments of fact have gained greater certainty and universal assent in the modernizing world, moral and other value judgments have become *less* compelling of uniform agreement. Why would this be if both types of judgment had the same cognitive status?

The problems in Tönnies' account cannot be dealt with merely by observing that he has created a distinction between “pure” sociology and *Sozialpolitik*, however relevant and legitimate such a distinction may be. The reason is that this formulation might lead one to believe that there were actually certain sciences (including the “science” or *Wissenschaft* of *Sozialpolitik*) which yielded objective knowledge of the validity of values, allowing us to rank value-based decisions and so to implement political measures in the genuine *knowledge* that we are right. This, however, is not possible on Tönnies' basic assumptions, and it only appears possible because of his sleight-of-hand with the meaning of the words “normal” and “subjective/objective.”

#### **IV. Concluding Remarks**

It should be clear at this point that Tönnies did in fact stand with Max Weber and others in the value judgment dispute, however much he may have been inclined to defuse the conflict with more traditional, normatively-minded social scientists. Equally apparent are the reasons why his cognitive commitments regarding values and normativity and his general way of thinking would have inclined him to this position.

A lifelong philosophical materialist who rejected any transcendental sources of values, whose pessimism kept him from hypostatizing history to take their place, Tönnies was shaped by

seventeenth-century currents of nominalism and voluntarism and by nineteenth-century scientific conceptions of human will and decision-making. More or less ignoring the neo-Kantian focus on the Is/Ought distinction, Tönnies was drawn to value-freedom by the logic of his own emotivist convictions. Despite his reputation as a promoter of the encompassing institutions and strong social norms of traditional community, Tönnies neither believed that such communities could be revived in their old form nor that they had in fact provided sources of values that transcended the assent of individual feelings and volition. This is hardly to say that he saw no difference in the values promoted by Gemeinschaft-like and Gesellschaft-like forms of social organization: the latter involved the ever-increasing presence of individualistic “arbitrary will,” and the abandonment of traditional impediments to it and the market-based, formal relations that accompany it. But his account of the sources of norms and values shows them in essence to be just as dependent, metaphysically speaking, on individuals’ assent to their legitimacy in community as in society. What shifts during the process of social change is not the “true” basis of values in the biological wills and emotional reactions of human animals, but the visibility and legitimacy of any source that appears and “feels” compelling, and the prominence of instrumental or means-ends oriented actions—both developments that tend to promote values originating in individual-specific and non-social wants or impulses. Science, as a quintessentially modern power, is part of this process, eroding sources of externally imposed values, and thus can hardly be a source of normativity itself. Moreover, in the absence of a universal human nature that Tönnies’ historicism leads him to reject, modern science necessarily also tends to remove remaining areas of apparent intersubjective agreement about values between individuals, since there is no reason to assume that they share goals or purposes in an increasingly competitive, individualistic environment.



Fundamentally, then, Tönnies believed that values depended on the emotions and the will of the individual for their validity, and that they were thus, at base, groundless. He thought that by giving an account of how some groups of people could come to an intersubjective agreement on the validity of values, it would be possible to show that some value judgments are valid and some are not. This was why he kept the open stance on the question of the future possibility of a guiding normative philosophy or a normative science of ethics that we noted in the introductory section to this chapter. And it also suggests why he thought that some judgments on the social policy questions of his day were simply within the range of “normal” intersubjective agreement, when in fact other perfectly rational people disagreed with him. But his argument rested on a confusion of the two senses of “subjective,” as outlined above. If value choices really are dependent on emotion and willed decisions, then it is completely contingent that they will accord with decisions made by other individuals in a given social grouping, however defined. The social structure that provides for the possibility of unanimity and intersubjective agreement may itself change—as we have seen in Tönnies’ historical account of the shift from *Gemeinschaft* to *Gesellschaft*—leading to the disappearance of unanimity. Through the definition of the average as the “normal” in his effort to be conciliatory, Tönnies, much like Durkheim and some other social theorists, has subtly and inadvertently derived an “ought” from an “is.”

So why have we considered Tönnies as a reasonably important figure in the early history of value-free science? Doesn’t this attempt at reconciling “ought” and “is” mean that Tönnies in fact advocated a prescriptive science? On the contrary, seen in light of all of his contributions to the debate, what it demonstrates is rather that the notion of value-free science involved more than the Is/Ought distinction. Despite his hedged and hesitant attempt to leave as an open question the reconciliation of descriptive and normative statements *within* scientific language, either in

certain normative sciences such as health and social policy, or in some possible future ethics, Tönnies called strongly for a separate, pure science of sociology that would have no business advocating one policy over another. Even in justifying the practical-policy orientation of the Verein für Sozialpolitik, as we have seen, Tönnies suggested that its best defense was a “here I stand” policy rather than a specious claim to be a *Normwissenschaft*. Because his basic philosophical commitments required acceptance of value subjectivism, he faced substantial logical pressure to make the distinction between theory and practice central to his methodology. Pure social science—“theory” as opposed to “practice”—could check the consistency of value systems in a Weberian manner, but could not generate theoretical support for holding one system over another. He showed his true colors in both words and actions: the possibility of a normative science was at most a vague hope for the future, while the present demanded the cultivation of a new organization for the support of pure sociology. For Tönnies, as for all the advocates of value-freedom, both theory and practice were legitimate pursuits, but they were not the *same* pursuits.

Thus, Tönnies’ inconsistencies in practice, which are apparent to any reader of his work, do not reflect a lack of commitment to value-freedom. Instead, they indicate the weakness of his preferred conception of objectivity within the “theory” side of the theory/practice distinction. Lacking the neo-Kantian impetus to consider how reference to values in social science is unavoidable, Tönnies continued to employ the older “ascetic” vision of objectivity, inspired in his case as in many others by natural scientific practice and by nineteenth-century positivism. “Value-freedom” as a principle could not become a persuasive redefinition of objectivity without addressing this problem. Here Weber provided a more plausible solution than had Tönnies. But he was not alone: as the following chapter will argue, Tönnies’ older contemporary and fellow

value-freedom advocate Georg Jellinek also put in place the elements necessary to transcend the ascetic conception of objectivity with a process-oriented conception.

## Part II: Law

### Chapter Four

#### Law as “Value-Free” Social Science: Georg Jellinek and Hermann Kantorowicz

It is a familiar nineteenth-century literary trope: the young man enters into student life with dreams of becoming a philosopher or writer or artist, only to have his parents insist he study law and enter a practical profession. Defiant, he rejects “bourgeois” convention and leads a raucous and vivid bohemian life; or, cowed, he obeys and enters into a career full of drudgery and meaninglessness, leading in the darkest case to despair and death. The law, it seems, was not much liked by literary writers.

In reality, many students faced just such a choice in their university studies, but found that the outcome lay more or less happily between these two extremes. Victor Ehrenberg, a law professor and close friend of Georg Jellinek from their student days in the early 1870s, later recalled that like many of his peers, he chose the study of law without great enthusiasm but without dislike, and pursued his literary, historical and philosophical interests at the same time.<sup>1</sup> Much the same could be said for Jellinek (1851-1911) and, a generation later, for Hermann Kantorowicz (1877-1940) and to a lesser degree Gustav Radbruch (1878-1949), all of whom ultimately accepted a parental preference that they devote themselves to legal rather than literary and philosophical studies. In each case, they did so by focusing on research topics at the borderline between law and other fields such as philosophy and history. And whatever may have been the case among their fellow students who went on to state service or private practice, the jurists considered here would retain their early-awakened interests in philosophy and the arts throughout their careers.

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<sup>1</sup> Christian Keller, “Victor Ehrenberg und Georg Jellinek im Spiegel ihres Briefwechsels 1872-1911,” in Keller, ed., *Victor Ehrenberg und Georg Jellinek: Briefwechsel 1872-1911* (Frankfurt: Klostermann, 2005), 13-140, here 14.

There is no question that this breadth of interests and knowledge of other fields contributed to the tendency toward methodological reflection and innovative scholarship in the work of Jellinek, Kantorowicz, and Radbruch, which forms our main subject in the second part of this dissertation. Along with Franz von Liszt, Eugen Ehrlich, Richard Schmidt, and many others, they were instrumental in bringing the study of criminal law and “state law” (*Staatsrecht*) into the orbit of the social sciences. The study of law in the German-speaking lands, known as *Rechtswissenschaft* or “legal science,” underwent a period of intensive methodological discussion beginning in the late nineteenth century which paralleled and overlapped with the debates among economists and sociologists that we have examined in the previous chapters. The jurists’ discussions of method were hardly limited to the question of whether legal science should be a “social” science; they involved many other questions about the nature of purely legal reasoning and about a raft of discipline-specific issues. But a very large swathe of the terrain of methodological argument among jurists during this period was composed of problems that had a direct bearing on our central question of value-freedom in social science. And among the major legal thinkers of the day, Jellinek, Kantorowicz and Radbruch were at the heart of the efforts to conceive a form of *Rechtswissenschaft* as a methodologically self-aware social science that would ensure a clear separation of facts from value judgments and other normative statements.

Turn-of-the-century German jurisprudence is not particularly well known in the English-language literature on social scientific methodology. This state of affairs may seem hardly surprising, given the differences between Anglo-Saxon common law and continental civil law traditions, which would lead one to expect a very limited familiarity with the terms of German legal discourse whether today or around 1900. In fact, many American and British scholars were well aware of the work of their German colleagues early in the last century. Major American

social scientists from John W. Burgess to W.E.B. DuBois studied with German jurists, while figures in Anglo-American legal and political thought of the stature of Karl Llewellyn and Ernest Barker readily credited a variety of German figures in their own work.<sup>2</sup> But this high level of engagement with German jurisprudence and its methodology even among non-lawyers was not sustained beyond the first decades of the twentieth century.

This chapter and the next aim to persuade the reader unfamiliar with this literature that jurisprudence is an important part of the story of methodological controversy in German *social science* before World War I, even though it has received relatively little attention from historians outside of Germany.<sup>3</sup> There are reasons to suspect as much from the outset. As we have already seen in the case of Max Weber, recent scholarship has increasingly recognized the importance of “legal science” itself as an ancestor to modern social science, has indicated the extensive use of modified legal concepts in early social scientific explanations, and has called attention to the fact that many of the influential social scientists of the Wilhelmine period were originally trained in the law before entering other fields.<sup>4</sup> Moreover, many jurists were substantially involved in the early stages of the professional development of sociology and political science even while they retained their disciplinary affiliation with the law. This is eminently true of Jellinek and Kantorowicz.<sup>5</sup> And naturally they and other legal scholars introduced elements of the

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<sup>2</sup> Wilhelm Bleek, *Geschichte der Politikwissenschaft in Deutschland* (Munich: Beck, 2001), 182-86; Michael Ansaldi, “The German Llewellyn,” *Brooklyn Law Review* 58:3 (1992), 705-777. The interest in German legal thought and legal philosophy is particularly evident in the two series of translations carried out under the auspices of the Association of American Law Schools, and published by the Harvard University Press under the heading of “Modern Legal Philosophy” and “20<sup>th</sup> Century Legal Philosophy” from the 1910s to 1940s.

<sup>3</sup> An exception must be made for Italian scholarship on German law and legal methodology, which has been extensive; I have not been able to take this body of work into account, however.

<sup>4</sup> See Chapter Four above. For a recent and more general survey of the ways in which the study of law was bound up with the growth of modern social science in the nineteenth and early twentieth centuries, see Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge: Cambridge University Press, 2008), Chs.1-3.

<sup>5</sup> The period 1890-1918 also saw the shift of most universities’ departments of economics (*Nationalökonomie*) from the philosophical faculties to the legal faculties, where they formed part of a renewed alliance of law and *Staatswissenschaft*: see David Lindenfeld, *The Practical Imagination: The German Sciences of State in the Nineteenth Century* (Chicago: University of Chicago Press, 1997), 305.

methodological thinking of their social scientific colleagues back into the discussions carried out within jurisprudence. This chapter and the next suggest that more careful contextualization of the idea of value-freedom in Wilhelmine social science must include increased attention to professors of law, and the ways in which specifically juridical problems entered into or were shaped by the broader stream of social scientific methodology.

Methodological debate among the jurists of the German Empire played out within a different constellation of new and traditional problems than the one that preoccupied the economists and sociologists we have considered. The most important issues were raised by a spate of attacks on the adequacy of two fundamental and related components of mainstream imperial legal thought: legal positivism and the method of legal constructivism, also known polemically as *Begriffsjurisprudenz* or “conceptual jurisprudence.” Broadly, the former offered a theory of the legitimate sources and forms of law, and the latter a theory of the methods by which it was to be expounded. We will return to these concepts in more detail below. Both were subject to question by distinguished law professors during the Bismarckian era, but the sense of “crisis” in the law that would later famously plague the Weimar Republic’s legal faculties and constitutional lawyers began to grow only in the last two decades of the Empire, as the critics increased in number and consequentiality after 1900.<sup>6</sup>

The two jurists under consideration in this chapter each contributed to the critique of imperial legal thought, and each sought to supplement purely legal reasoning with social scientific studies, although in quite different ways. Georg Jellinek was an eminent professor of public law—a category which includes constitutional and administrative law—and sought to

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<sup>6</sup> Stefan Koriath, “Erschütterungen des staatsrechtlichen Positivismus im ausgehenden Kaiserreich,” *Archiv des öffentlichen Rechts* 117 (1992), 212-238. Koriath principally discusses public law work by Carl Schmitt, Rudolf Smend, and Erich Kauffmann in the years before 1914; earlier critics included the public law specialists Felix Stoerk and Edgar Loening, and, much better known today, Otto von Gierke and the later Rudolf von Jhering, in the fields of German and Roman private law respectively.

reform rather than to abandon legal positivism in his studies of the state and of citizens' rights. Hermann Kantorowicz, a scholar of criminal law and its history, was one of the leaders of the *Freirechtsbewegung* (Free Law movement), which was an insurgent program for changing the way law was applied at the level of the judicial decision and included a strong critique of the methods of legal constructivism. Both were known for their affinities with neo-Kantian philosophy, although as this chapter will show, it is mistaken to see their methodological thought during the period before World War I as shaped principally by southwest German neo-Kantian value theory.

It may initially seem strange to juxtapose the work of a scholar of constitutional law and political science with that of a scholar of criminal law and legal history. But disciplinary boundaries were still fluid in the late nineteenth century—Jellinek's early work, for instance, was in criminal law—and the most foundational tenets of the methodology of legal science were shared across the fields of civil, criminal, and public law. In order to understand Jellinek's and Kantorowicz's views on normativity in the law, and on values and value-freedom in legal science, we must begin by examining this shared professional background. In the traditions of conceptual jurisprudence and legal positivism, problems involving the nature and grounds for value judgments and other normative judgments, the separation of the normative from the factual, and the problem of objectivity in the sciences were raised that were formative for Jellinek and Kantorowicz in their different ways.

## **I. The Heritage of Constructivism and Legal Positivism in Nineteenth-Century Germany**

The method of "construction" that gives its name to legal constructivism may be defined neutrally as "the logical and systematic ordering of terms, principles, and institutions of law"



drawn from the existing valid legal sources, however disorderly and disorganized they might initially be, in the pursuit of a clear system of legal norms.<sup>7</sup> Constructivism has typically been associated with the thesis that deductive logic is the only appropriate method for such ordering, as we shall see. Legal positivism is challenging to define, as it has taken many forms, but it is generally agreed to possess several basic characteristics. The philosopher H.L.A. Hart identifies five “contentions” which are attributable to the best-known legal positivists: “(1) that laws are commands of human beings; (2) that there is no necessary connexion between law and morals...; (3) that the analysis or study of meanings of legal concepts is...to be distinguished from (though in no way hostile to) historical inquiries, sociological inquiries, and the critical appraisal of law...; (4) that a legal system is a ‘closed logical system’ in which correct decisions can be deduced from predetermined legal rules by logical means alone; (5) that moral judgments cannot be established, as statements of fact can, by rational argument, evidence or proof...”<sup>8</sup> In short, law is not to be mixed with any extra-judicial input, and it is not inherent in the natural order but is instead a malleable set of norms produced by human beings and developed thereafter by logic. Nineteenth-century German positivism specifically has been “characterized by its adherence to three fundamental propositions about the nature of the legal order: its radical separation of public and private law; its insistence on treating the law in isolation from political, social, and ethical questions; and its conviction that the legal order, which lay beneath the often imperfect framework of statute laws, could be construed by value-free deduction.”<sup>9</sup> Positivism and

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<sup>7</sup> Hasso Hofmann, “From Jhering to Radbruch: On the Logic of Traditional Legal Concepts to the Social Theories of Law to the Renewal of Legal Idealism,” in Damiano Canale, Paolo Grossi, and Hasso Hofmann, eds., *A History of the Philosophy of Law in the Civil Law World, 1600-1900*, Vol. 9 of *A Treatise of Legal Philosophy and General Jurisprudence* (Dordrecht: Springer, 2009), 301-354, here 305.

<sup>8</sup> H.L.A. Hart, *The Concept of Law* (New York: Oxford University Press, 1961), 253.

<sup>9</sup> Michael John, “Constitution, Administration, and the Law,” in Roger Chickering, ed., *Imperial Germany: A Historiographical Companion* (Westport, CT: Greenwood, 1996), 185-214, here 201. See also Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham: Duke University Press, 1997), 3-4, for a differentiation of the meanings of positivism.

constructivism are not identical, but they could easily interrelate. Critics have argued that they did in fact lead in the German Empire to the same situation, in which “new [legal] cases requiring new decisions which were unforeseeable when the laws were enacted [did] not give rise to a contentual ‘enrichment’ of the laws [and especially not by the introduction of social, political, or economic considerations—AJS] but only to a new formulation of concepts which were already completely laid out in the existing system, but only not sufficiently formulated.”<sup>10</sup> In other words, the law was said to develop through purely juridical logic from the norms contained in duly established statute or precedent alone.

Both doctrines were mined from the seemingly inexhaustible vein of Roman law, which had enriched German jurisprudence in the thirteenth, sixteenth and seventeenth centuries, and once again at the beginning of the nineteenth.<sup>11</sup> In the aftermath of the Napoleonic occupation, the Historical School of Jurisprudence, under the leadership of Friedrich Carl von Savigny, had directed German legal scholarship decisively away from the influence of Enlightenment natural law and toward the historical study of the Roman law.<sup>12</sup> Savigny and his students and allies were remarkably successful in shaping the terms of legal discourse throughout the subsequent decades, and their approach gradually became consolidated into what we can call classical imperial legal thought, marked by positivism and the “conceptual” or constructivist method.<sup>13</sup>

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<sup>10</sup> Arthur Kaufmann and Winfried Hassemer, “Enacted Law and Judicial Decision in German Jurisprudential Thought,” *University of Toronto Law Journal* 19:4 (1969), 461-86, here 463.

<sup>11</sup> Two classic works on the history of the civil law in Germany, and elsewhere in Europe, since the early modern “reception” of Roman law are Franz Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2d ed. (Göttingen: Vandenhoeck & Ruprecht, 1967), English translation as *A History of Private Law in Europe* (Oxford: Clarendon, 1995), and Helmut Coing, *Europäisches Privatrecht*, 2 vols. (Munich: Beck, 1985-89). For the nineteenth century and after, see also Filippo Ranieri, *Das Europäische Privatrecht des 19. und 20. Jahrhunderts* (Berlin: Duncker & Humblot, 2007).

<sup>12</sup> Authoritative on Savigny are Joachim Rückert, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny* (Ebelsbach: Gremer, 1984), and idem., *Savigny-Studien* (Frankfurt: Klostermann, 2011). In English, see also the symposium in the *American Journal of Comparative Law* 37:1 (1989).

<sup>13</sup> I borrow the term “classical legal thought” from the historian of American law Morton Horwitz, who uses it to refer to fairly similar patterns in nineteenth-century American jurisprudence in *The Transformation of American Law, 1870-1960* (New York: Oxford University Press, 1992).

This development was not linear, and any attempt to portray a mainstream “school” of imperial legal thought is fraught with risks. Throughout the nineteenth century, there were sharp controversies<sup>14</sup> between advocates of “native” German private law, and two types of “Romanists”: historians who regarded only the original Roman sources as legally valid, sometimes even dismissing the sixth-century *Corpus Juris Civilis* as “impure” Roman law, and the inheritors of the sixteenth-century “reception” of Roman law, which had developed through a semi-scholastic tradition of commentary into a distinct body of scholarship known as the *usus modernus pandectarum* or *Pandektistik*.<sup>15</sup> Further conflicts arose between those favoring legislatively enacted statutory law, and proponents of slowly developing and often judge-made common law, while the related and ongoing debate about private law codification was not concluded until 1896 with the acceptance of the new Civil Code (*Bürgerliches Gesetzbuch*, or BGB).<sup>16</sup> Opposing philosophies of legal validity, relying respectively on claims of fidelity to the original sources of the law, and on claims of the law’s appropriateness to current economic, social, and political conditions, were in tension throughout the century and particularly in its second half.<sup>17</sup> Meanwhile, public law scholars struggled with the question of whether it was legitimate to use the primarily Roman law methods and assumptions of civil law in describing the legal relations of state and citizen (or subject).

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<sup>14</sup> Rückert notes that Germanist-Romanist quarrels after the 1830s were more about politics than about method: *Savigny-Studien*, 98.

<sup>15</sup> *Pandektistik* was the nineteenth-century study of the “pandects” or “digests,” a portion of the late Roman *Corpus Juris Civilis* (the law code compiled at the behest of the emperor Justinian), in their *contemporary* usage, which formed the centerpiece of German common law (*gemeines Recht*) and of civil law education in the universities of northern Europe prior to the codification movement; the older term “*usus modernus*” derived from a book by a seventeenth-century German scholar and represented a combination of the pandects with medieval customary and canon law. See Wieacker, *History of Private Law*, 159-95.

<sup>16</sup> Michael John, *Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code* (Oxford: Clarendon, 1989), provides an encompassing history of the codification debates and their political and social significance. “Common law” in the German context primarily means the *usus modernus* form of Roman law.

<sup>17</sup> Kauffmann and Hassemer refer to these two approaches as the “subjective” and “objective” theories of interpretation, respectively, owing to their attempts at reconstructing the “subjective” intentions of the original legislator or at assessing the “objective” social and economic needs of the day: “Enacted Law,” 465-66.

In light of this dissensus, the notion of a mainstream body of imperial legal thought must be used with caution. Critics such as Otto von Gierke, Rudolf von Jhering in the second half of his career, and Kantorowicz were nonetheless persuaded that there was indeed a set of dominant positivist and constructivist assumptions from at least the 1850s through the 1890s, reflected in the standard textbooks for legal education and in the two decades of work which went into the preparation of the Civil Code. The critics' view has been the prevailing wisdom since the early twentieth century, though it has recently been challenged by more balanced accounts.<sup>18</sup> In this section, we will acknowledge the recent revisionist picture of mid-nineteenth-century and imperial legal thought, while also recognizing that the way in which critics like Jhering and Kantorowicz saw the state of their discipline is more important for understanding *their* thought than is the accurate reconstruction of the work they criticized. Our sole concern here is with constructivist and positivist doctrines bearing on value-judgments, normativity, and objectivity.

We begin with private law. The agenda set by Savigny (1779-1861) at the beginning of the century involved, as already indicated, placing Roman law at the heart of legal education, and expounding it with careful, philologically informed attention to its original Roman meanings rather than to those that had grown up under the *usus modernus*. Savigny spent much of his career gathering archival materials and publishing histories not only of ancient Roman law but of the medieval Roman law as well (taken on its own terms), and preferred teaching private law according to the Roman sources instead of offering instruction in the late eighteenth-century Prussian code, the *Allgemeines Landrecht*.<sup>19</sup> Nevertheless, as Joachim Rückert has pointed out,

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<sup>18</sup> Representative works accepting the idea of a positivist and constructivist mainstream in the *Kaiserreich* include the influential Karl Larenz, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer, 1960), 16-82; Wieacker, *History of Private Law*, 279-370; and Walter Wilhelm, *Zur juristischen Methodenlehre im 19. Jahrhundert: die Herkunft der Methode Paul Labands aus der Privatrechtswissenschaft* (Frankfurt: Klostermann, 1958).

<sup>19</sup> Theodore Ziolkowski, *Clio the Romantic Muse: Historicizing the Faculties in Germany* (Ithaca: Cornell University Press, 2004), 113; 126-28.

the “Historical School” was not one of legal history (*Rechtsgeschichte*) alone, but of historical legal science (*geschichtliche Rechtswissenschaft*), and it was very much oriented toward the socioeconomic and political issues of Savigny’s own day.<sup>20</sup> Savigny and allies like Georg Friedrich Puchta (1798-1846) fully intended to deploy the Roman law against Enlightenment absolutism and natural law. Marked by a late eighteenth-century revival of “ancient-constitutionalism,” decentralization, and support for the Holy Roman Empire against princely absolutism, they also sought to respond to the upheavals of the revolutionary wars by remaking the legal order in imitation of more stable ancient Roman social relations, and by de-feudalizing the peasantry without destroying the estate-based social order.<sup>21</sup> History could be pressed into service, in other words, and not simply used to establish the purely juridical meaning of particular legal texts with philological precision.

Not only did Savigny allot history a central place in the study of *Rechtswissenschaft*—a term that he popularized—but he held other views differentiating his work from later positivist and constructivist tenets. Unlike his Kant-influenced teacher, Gustav Hugo, who had preceded him in attacking the Enlightenment natural law tradition of Christian Wolff and in producing historical studies of Roman law, Savigny rejected the strict separation of “is” and “ought.”<sup>22</sup> He was a man of his day, and that meant among other things that his thinking was deeply shaped by romantic metaphysics and the conviction that there were real “essences” such as the spirit of the people (*Volksgeist*)—that such terms were not only a manner of speaking but denoted real entities.<sup>23</sup> Accordingly, a recent study has argued in depth that he adopted without reservation an organicist metaphysics of the “objective reality” of the legal order as revealed through the

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<sup>20</sup> Rückert, *Savigny-Studien*, 80.

<sup>21</sup> James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton: Princeton University Press, 1990), 149-50 and Ch. 5 passim.

<sup>22</sup> Rückert, *Savigny-Studien*, 84.

<sup>23</sup> Ibid. Hugo’s critique of these ideas, noted by Rückert, had little effect on Savigny.

historical development of the *Volksgeist*, and that his metaphysical worldview allowed him to see law, like religion, as having an objective normative meaning for the individual-in-society that could link *Sein* and *Sollen*.<sup>24</sup> Yet, despite its grounding in the romantic world of ideas, several aspects of Savigny's thought nevertheless helped set the direction for later developments.

The rejection of natural law was pivotal, of course, as positivism is defined in opposition to natural law currents of thought. But for Savigny as for his peers and successors the abandonment of natural law did not at all mean the abandonment of a rational, systematic order that had a life of its own.<sup>25</sup> In fact, Savigny inaugurated the constructivist and positivist practice of treating the positive law as an independent system. He insisted that the “grammatical, logical, historical, and systematic” elements of legal interpretation were coequal, one of his most lasting doctrines.<sup>26</sup> There was no contradiction here because the law, developing organically rather than through contingent or arbitrary historical changes, could always be seen as a real “whole [*Ganze*], ordered according to [its own] principles.”<sup>27</sup> Ernst-Wolfgang Böckenförde has observed that Savigny's metaphysics led him in fact to a rather *un*-historical position from which systematics began to look increasingly attractive. If history was not a process of contingent change, but a unified, natural, organic process directly tied to the *Volksgeist*, scholars did not need to look for law's justification in its concrete social functions in a given society, but could assume it and restrict themselves to “explain[ing] and understand[ing] law *in terms of itself*,” thereby allowing them “to adopt or construct and develop legal concepts and legal institutes on the basis of the legal fabric as handed down.”<sup>28</sup> And it was noteworthy that despite the central

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<sup>24</sup> Wolfgang-Paul Reutter, “Objektiv-Wirkliches” in *Friedrich Carl von Savignys Rechtsdenken, Rechtsquellen- und Methodenlehre* (Frankfurt: Klostermann, 2011), 74, 461.

<sup>25</sup> Whitman, *Legacy of Roman Law*, 80.

<sup>26</sup> Rückert, *Savigny-Studien*, 612.

<sup>27</sup> *Ibid.*, 89; Ziolkowski, *Clio*, 114-15.

<sup>28</sup> Ernst-Wolfgang Böckenförde, *State, Society, and Liberty: Studies in Political Theory and Constitutional Law* (New York: Berg, 1991 [1976]), 12.

place accorded to the *Volksgeist*, Savigny and his contemporaries saw the rigorous science of *Rechtswissenschaft* as the primary way of translating popular consciousness into the tangible form of a valid written legal source (*Rechtsquelle*).<sup>29</sup> This emphasis on the professional Roman law scholar was a manifestation not just of tendencies toward constructivist systematics but toward positivist concerns about impartiality, objectivity, and exclusion of extra-legal considerations.<sup>30</sup>

The professor of law oriented toward systematics would now hold the field, and his embodiment was G.F. Puchta, Savigny's successor at Berlin as of 1842. He was also shaped by early nineteenth-century philosophical currents, but was somewhat closer than Savigny to German idealism.<sup>31</sup> He, too, acknowledged the place of history and the *Volksgeist* as a source of law, but placed much more emphasis on the role of "expert academic interpretation" at the expense of popular understanding; and without reverting to reliance on a rational natural law, he increasingly attempted to "deduce points of legal principle from the inner-juridical preconditions of the [positive] law itself," particularly from the Roman law idea of the legal person.<sup>32</sup> "[I]t is the task of legal science," he wrote, "to apprehend the legal provisions in their systematic interconnection as entities which condition each other and originate from each other, in order to trace the genealogy of every legal provision up to its principle and likewise in order to be able to descend from the principles down to the lowest rungs of the ladder. In this activity, those legal provisions are brought to the daylight which, hidden in the spirit of national law, have come into

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<sup>29</sup> Ibid., 4; Whitman, *Legacy of Roman Law*, 101, 117-19; Rainer Schröder, "Die deutsche Methodendiskussion um die Jahrhundertwende," *Rechtstheorie* 19 (1988), 323-367, here 329.

<sup>30</sup> Whitman, *Legacy of Roman Law*, presents throughout a compelling argument that the Roman law was perceived to be "uniquely impartial," in strong contrast to the scattered and uncertain customary law, and its professors enjoyed and encouraged the associated prestige.

<sup>31</sup> Hans-Peter Haferkamp, *Georg Friedrich Puchta und die "Begriffsjurisprudenz"* (Frankfurt: Klostermann, 2004), 315-24, and Part II, Ch. 4 generally, discusses his views of Hegel—an early influence—and especially Schelling. Law itself for Puchta was not "rational" (*vernünftig*), but must *become* rational through its development process and with the assistance of legal science: *ibid.*, 356.

<sup>32</sup> Chris Thornhill, *German Political Philosophy: The Metaphysics of Law* (London: Routledge, 2007), 192.

appearance neither in immediate consciousness of the members of a people and in their actions nor in the utterances of the legislator.”<sup>33</sup>

The traditional picture of Puchta’s method portrayed it as a translucent “pyramid” whose uppermost point is the axiom of the legal person: with each step up the pyramid to a higher level of generality, one can “see” the way in which the levels of rules below are ordered according to the principle of one’s own level, and one loses “breadth” but gains “height” in terms of the legal rules explicitly covered by the principle in question.<sup>34</sup> Puchta is said to have endorsed the following schema for the scientific jurist to follow when confronted with the need for a new legal rule: old rule—induction across the relevant doctrine (*Dogmatik*)—derivation of principle—deduction from principle—new rule. Both of these depictions imply that the jurist needs only the tools of logic to understand the entire legal system and how its parts relate. A recent study has argued persuasively that this picture caricatures Puchta’s more nuanced theory, which was considerably more sensitive to history in particular, but it does not deny that he relied on the concept of the legal person as a “highest principle” (*oberster Grundsatz*) or that logical deduction plays a central, if not unique, role in his thinking.<sup>35</sup> If Savigny had once remarked that the juridical method entailed a level of certainty “which is not to be found anywhere outside of mathematics, and [that] one can say without exaggeration that [jurists] calculate [*rechnen*] with

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<sup>33</sup> Puchta, 1 *Cursus der Institutionen*, 9<sup>th</sup> ed. (Krüger, 1881), 22, cited in Kaufmann and Hassemer, “Enacted Law,” 464.

<sup>34</sup> Larenz, *Methodenlehre*, 17-18, gives one such account. Sometimes the pyramid is “inverted” in order to make the most general principles the most “basic.”

<sup>35</sup> Haferkamp, *Puchta*: especially Part I, Chs. 1-3, and 443-460; an earlier critique, placing Puchta much closer to romantic metaphysics, is in Dietrich Tripp, *Der Einfluss des naturwissenschaftlichen, philosophischen und historischen Positivismus auf die deutsche Rechtslehre im 19. Jahrhundert* (Berlin: Duncker & Humblot, 1983), 202-3.



their concepts,” Puchta made this conceptual-deductive approach central to mid-century jurisprudence.<sup>36</sup>

Constructivism and positivism gained ground especially after 1848 in part because of scholarly developments and in part for political reasons. The 1840s and 1850s represented a shift in epistemological ideals away from the great systems of German idealism toward the model of the natural sciences, whose spectacular progress lent authority to those who would deploy their methods and metaphors in the human sciences. The mid-century consequently saw the popularity of “positivism” in the more general sense, owing to Comte and his vulgarizers. Essentially a philosophy of science that aimed to pare down the extremes of speculative philosophy by refocusing attention on systematic study of empirical regularities in the physical and human worlds, positivism never really distanced itself as fully from metaphysical baggage as it claimed.<sup>37</sup> Its impact on legal science took various forms, including attempts at sociological and psychological theories of law which removed effective notions of the freely willing legal person in favor of determinist models, and recommended altering legal rules to correspond with this shift in understanding.<sup>38</sup> But it also gave support to constructivist and legal positivist doctrines.

In legal science, no one better embodied this shift from speculative idealism to “natural scientific” positivism than did Rudolf von Jhering (1818-1892). Throughout his life, Jhering’s work involved a liberal use of natural scientific metaphor; his early writings favored chemical metaphors, particularly the conception of legal concepts as physical “bodies,” while his later

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<sup>36</sup> Savigny’s *Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, quoted in Peter Raisch, *Juristische Methoden* (Heidelberg: Müller, 1995), 95.

<sup>37</sup> There is an excellent critical survey of positivist forms of thinking in natural science, in philosophy, in history, and in the philosophy of natural science in Tripp, *Positivismus*, 43-165, which concludes that the latter three forms did not break away from speculation in any meaningful sense.

<sup>38</sup> *Ibid.*, 257-86.

writings drew (in rhetoric, if not in substance) on Darwinian biology. He referred to legal science as a “Naturwissenschaft auf geistigem Gebiet.”<sup>39</sup> The substantive connection with natural scientific method was negligible, but it provided a new way of looking at the constructivism Jhering inherited from Puchta, to whom he dedicated his main early work, *Geist des römischen Rechts* (four volumes, 1852-1865).

The second volume of this work, which was reprinted throughout the century, provided the classical expression of constructivism for jurisprudence in the age of Bismarck. Mario Losano has argued that what truly characterized early constructivism was that it relied on a “substantive” or “inner” definition of “system.” That is to say, if a formal (or “outer”) systematics confronts a body of legal doctrine with a set of principles that allow the jurist to gain “orientation” or understanding of the material through an imposed order, the “inner” approach characteristic of constructivism takes the material itself to embody a substantive order.<sup>40</sup> Although this conception coincides closely with the metaphysical assumptions of Savigny, and Losano suggests that Jhering was himself receptive to it, Jhering clearly distanced himself from the remaining historical elements in *Rechtswissenschaft* in the 1840s.<sup>41</sup> And indeed, what marks the new, more “scientific” version of constructivism in Jhering’s work is the appeal to *method* or technique as what constitutes the guarantee for the certainty of a branch of knowledge, including legal doctrine. Where Savigny and Puchta sought objectivity in the legal order itself, for Jhering objective knowledge relied not on discerning the true essence of a legal system, but rather on deploying the right method.<sup>42</sup>

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<sup>39</sup> Quoted in Hofmann, “From Jhering to Radbruch,” 304-05.

<sup>40</sup> Mario Losano, *Studien zu Jhering und Gerber* (Ebelsbach: Gremer, 1984), 114-15.

<sup>41</sup> Christoph-Eric Mecke, “Objektivität im Recht und Rechtswissenschaft bei G.F. Puchta und R. v. Jhering,” *Archiv für Rechts- und Sozialphilosophie* 94:2 (April 2008), 147-168, here 158.

<sup>42</sup> *Ibid.*, 159.

For the early Jhering, until the 1860s, legal technique meant the “simplification” and ordering of the inherited legal materials according to criteria similar to those proposed by Puchta. One of the non-scientific metaphors Jhering used to explain the process of construction was the alphabet: a given set of legal concepts, properly ordered according to the rules established by legal science, could, like letters of the alphabet, be combined in any allowable fashion to meet the needs of a given case or contract.<sup>43</sup> But his most striking claim was for the generative power of legal concepts. Rather than passive ciphers ordered by the legal scholar, he sometimes spoke of them as “a source of new material that can never run dry” and even claimed that “concepts are productive: they mate and create new concepts.”<sup>44</sup> Such a position easily allowed for the notion that the legal order was a “gapless” fabric of concepts that could cover any legal case, no matter how novel, and in which any apparent “hole” could be closed by new deductions to fit the new situation. Jhering’s contemporary Bernhard Windscheid, probably the most influential civil lawyer in Germany in the second half of the nineteenth century, shared this view that the law was a gapless fabric, as did the author of a *summa* of legal positivism, Carl Bergbohm.<sup>45</sup> The draw of this viewpoint was that it presented the law as a pristine and neutral instrument which could help trained jurists tender unbiased and objective answers to any claimant, whether in the courtroom or the boardroom. Small wonder that a thoughtful later critic like the jurist Max Rümelin identified the desire for objectivity and the avoidance of value-judgments as the principal reason for the popularity of legal constructivism in its classical form.<sup>46</sup>

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<sup>43</sup> On the legal alphabet analogy and Jhering’s method generally, see Alexander Somek, “Legal Formality and Freedom of Choice: A Moral Perspective on Jhering’s Constructivism,” *Ratio Juris* 15:1 (2002), 57 and passim.

<sup>44</sup> Quoted in Hofmann, “From Jhering to Radbruch,” 305.

<sup>45</sup> Gerhard Sprenger, “Rechtsbesserung um 1900: Im Spannungsfeld von Positivismus und Idealismus,” in Gangolf Hübinger, Rüdiger vom Bruch and Friedrich Wilhelm Graf, eds., *Kultur und Kulturwissenschaften um 1900*, vol. 2: *Idealismus und Positivismus* (Stuttgart: Steiner, 1997), 135-63, here 148-49.

<sup>46</sup> Max Rümelin, “Developments in Legal Theory and Teaching During My Lifetime,” (1930), in M. Magdalena Schoch, ed. and trans., *The Jurisprudence of Interests* (Cambridge: Harvard University Press, 1948), 14.

Political developments in Germany also contributed. Both constructivism and positivism received an impetus from the responses to liberal failures in the 1848 revolutions. In the aftermath of those events, the “speculation” of the idealist systems seemed not just unscientific but suspect through its perceived association with revolutionary violence. Both constructivism and positivism, but particularly the latter, could be seen as friendly to the existing monarchical order, in the patchwork of German states as well as in the German empire after 1866-71.<sup>47</sup> But they could also appear to be part and parcel of German liberal goals following the revolution, as they were instrumental in the fight for the *Rechtsstaat* – the state constrained by the rule of law and established administrative-legal procedures. German liberals in the 1850s, abandoning the demand for active political participation up to a point, focused on achieving “legal certainty” (*Rechtssicherheit*): the impersonal, non-partisan and universal extension of uniform rules to cover all citizens regardless of status, which would make freedom possible in the sphere of civil society and the economy.<sup>48</sup> The exclusion of politics and political value-judgments from law in positivism was closely tied to this goal of decreasing the justice system’s arbitrariness and making it more objective. Of course, the attempt to erect a wall of law against the tides of political power, and to establish formal rules and procedures based on neutral logic, can itself be seen as a political or value-oriented goal.<sup>49</sup> The genius of liberalism, its opponents have claimed, is that it “quite successfully conceals its politics, which is the politics of getting rid of politics.”<sup>50</sup>

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<sup>47</sup> For a reductionist view of positivism along these lines, see Hermann Klenner, “Rechtsphilosophie im Deutschen Kaiserreich,” in Gerhard Sprenger et al., eds., *Deutsche Rechts und Sozialphilosophie um 1900*. Archiv für Rechts- und Sozialphilosophie Beiheft 43 (Stuttgart: Steiner, 1991), 11-17. Klenner uses an 1854 speech by Windscheid as symbolic of the decisive turn away from both the remainders of natural law in Vormärz liberalism and from progressive philosophies of history, and toward state authority.

<sup>48</sup> Michael Stolleis, *Public Law in Germany, 1800-1914* (New York: Berghahn, 2001), 255-57; Pierangelo Schiera, *Laboratorium der bürgerlichen Welt: Deutsche Wissenschaft im 19. Jahrhundert* (Frankfurt: Suhrkamp, 1992), 112.

<sup>49</sup> As Thomas Nipperdey points out: *Deutsche Geschichte, 1866-1918*, vol. 1, *Arbeitswelt und Bürgergeist* (Munich: Beck, 1990), 655.

<sup>50</sup> David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Clarendon, 1997), 39.

Whether or not that is a fair judgment, it is clear that positivism and constructivism created a climate in which questions about the objectivity of legal science were settled by reference to pure logic, systematicity, gaplessness, and the exclusion of extra-judicial factors—however the reality may have been. When the two doctrines began to come under attack toward the end of the nineteenth century, from a “reformed” Jhering and others who followed in his tracks, it was not from a methodological angle but for their seeming inability to address the new social and economic conditions of a rapidly urbanizing and industrializing nation. Proposals to open law to the consideration of social “interests,” such as those of Jhering’s famous late work *Der Zweck im Recht*, were intended to bypass the process of “calculating with concepts” and to make law more sensitive to economic realities. These efforts, of course, raised methodological questions in turn. If the law were to open to social considerations beyond rote logic, what would keep these from destroying its precarious objectivity? If the legal order were in fact *not* “gapless,” and must rely on the introduction of human judgment about social realities, what would keep a judge’s decisions “objective” and preserve the separation of legislative from judicial powers?

These were some of the questions confronted by legal scholars in the Wilhelmine period, including Jellinek and Kantorowicz. Their answers would show, once again, a shift from a mid-nineteenth-century conception of objectivity as the rigid exclusion of value-judgments from social science, to an acceptance that such judgments are unavoidable and—in Jellinek’s case—an attempt to provide a new way of conceiving objectivity that relied on “process” rather than on personal asceticism.

## **II. Georg Jellinek and the Science of State Law**

Jellinek has been regarded as an important methodological innovator for bringing “value-free” and “*zweckrational*” social science, conceived as an ideal-type-driven, empirical *Wirklichkeitswissenschaft*, to constitutional law, and for introducing “scientific value relativism” into German political science.<sup>51</sup> His own intellectual formation as a public law scholar was deeply indebted to the tradition of state-law positivism represented by Gerber and Laband and having its roots in the private law scholarship we have examined. But his work, beginning in the 1870s, was marked by its ready confrontation with new currents of thought which placed emphasis on social and economic problems, and on the need for methodological foundations in the rigorous tradition of Kantian critique. What he produced was a classical “synthesis” of positivist method with sociological investigation and neo-Kantian methodology, which served as a benchmark for later public lawyers and political scientists.<sup>52</sup> Basically unknown in Anglo-American scholarly literature, and having only begun to receive attention in Germany amid a brief “Jellinek Renaissance” centered on the centennial of his *Allgemeine Staatslehre* in 2000, Jellinek’s methodological work deserves extended treatment. Here we examine one aspect of it: his personal path to the value-freedom doctrine, and to an associated idea of objectivity, which he helped introduce into public law and political science.

#### **a) Life, Career, and Philosophical Background, 1851-1911**

Born in Leipzig in 1851 to a Jewish rabbinical family, Jellinek moved to Vienna with his family in 1857 when his father accepted a position at the new temple in the Leopoldstadt quarter.<sup>53</sup> Camilla Jellinek, his wife, would later write a rather touching description of his

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<sup>51</sup> Martin Sattler, “Georg Jellinek: Ein Leben für das öffentliche Recht,” in Helmut Heinrichs, et al., eds., *Deutsche Juristen jüdischer Herkunft* (Munich: C.H. Beck, 1993), 355-68; Arnold Brecht, *Political Theory: The Foundations of Twentieth-Century Political Thought* (Princeton: Princeton University Press, 1959), 220.

<sup>52</sup> Stolleis, *Public Law*, 441.

<sup>53</sup> Klaus Kempter, *Die Jellineks, 1820-1955: Eine familienbiographische Studie zum deutschjüdischen Bildungsbürgertum* (Düsseldorf: Droste, 1998), 113-14.

devotion to his parents, and of the intellectual interchange between Georg and his scholarly father Adolf, who remained his closest confidant and advisor throughout the rest of the father's life.<sup>54</sup>

The only tension between the two lay in Georg's relationship to Judaism. Despite Adolf's tolerant and liberal religious convictions, his son found it difficult to muster an interest in the Jewish faith, and throughout the first part of his life found the official designation of Jewish confessional identity a burden owing to Austria's increasingly anti-Semitic climate. As Camilla described her husband's views in the 1870s and 80s, "Since this Judaism, to which he was confessionally indifferent and to which he felt bound for his father's sake, threatened to close all free paths into life, he sometimes hotly cried out to his father, 'I must bleed for your convictions!'"<sup>55</sup> And indeed, to some extent he did—for he had to confront vigorous anti-Semitic opposition in his early academic career from the Austrian clerical faction within the University of Vienna and the education ministry, which left him with a lifelong dislike of Catholicism. Shortly before his father's death, Jellinek quietly left the Jewish religious community along with his wife and remained officially "without confession" until being baptized into the Lutheran church at the end of his life in 1910, a step he and his wife had taken for their children in 1896 so as to minimize anti-Semitic obstacles to their advancement.<sup>56</sup>

Despite this background, and despite his own lack of conventional belief, Jellinek was nonetheless far from hostile to religion. He argued in his most popular book that religious minorities' pursuit of freedom of belief and practice was central to the development of the liberal

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<sup>54</sup> Camilla Jellinek, *Georg Jellinek: Ein Lebensbild*, reprinted from Georg Jellinek, *Ausgewählte Schriften und Reden* Vol. 1. (Aalen: Scientia Verlag, 1970), 7-9. Camilla contributed to the Heidelberg tradition of professors' widows writing the biographies of their husbands, joining Marianne Weber, Marie-Luise Gothein, and others. Her description is amply confirmed by the surviving letters between Jellinek and his father.

<sup>55</sup> *Ibid.*, 10.

<sup>56</sup> Kempter, *Die Jellineks*, 288-89; Keller, "Victor Ehrenberg und Georg Jellinek," 138.

tradition of human rights,<sup>57</sup> and he shared prominently in the Heidelberg fascination with the impact of religion on other areas of social and economic life which was institutionalized in the Eranos Circle and included Weber, Gothein, and many others.<sup>58</sup> In a privately printed memorial of his mother after her death, circulated to other members of the Jellinek family, he wrote that “I understand by religion the consciousness (mediated by feeling) of the existence and ceaseless, unmediated action of divine powers in the course of nature and of the fate of man,” and praised his mother’s deep religious feeling over the “frozen forms and customs which have become meaningless, in which the bulk of religion consists for the greatest number of people.”<sup>59</sup>

Although occasionally chided for ignoring books on Judaism, Jellinek made full use of the rest of his father’s library, and was well prepared for the relatively secular and classical curriculum of the Vienna Gymnasium.<sup>60</sup> He did not spend long there, entering the University of Vienna in 1867 at age sixteen, where he began a program of studies that lasted him until 1878, excepting only a year of administrative work in the Austrian civil service. Jellinek studied not only at Vienna, but at Heidelberg and at Leipzig, and proceeded to gain a very broad education in philosophy, law, history, economics and social problems, the natural sciences, German literature, and the arts. His father supported him in this omnivorous learning, and Jellinek eventually earned two doctorates, one in philosophy and one in law. It was difficult for him to decide on a single area of study; Camilla later wrote that “he often said that he had shed ardent tears over the fact that he couldn’t learn everything, everything, and assimilate it all; that it came

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<sup>57</sup> Georg Jellinek, *Die Erklärung der Menschen- und Bürgerrechte: Ein Beitrag zur modernen Verfassungsgeschichte*, 2d ed. (Berlin: Duncker & Humblot, 1904 [1895]), esp. 35-46. This is the only work of Jellinek’s ever translated into English.

<sup>58</sup> Kempter, *Die Jellineks*, 285.

<sup>59</sup> Nachlass Georg Jellinek, Bundesarchiv Koblenz, NL 1136/36. Hereafter NL Jellinek.

<sup>60</sup> Kempter, *Die Jellineks*, 154-59; Camilla Jellinek, *Lebensbild*, 10-11.



down to having to make a choice.”<sup>61</sup> And so he chose the law, initially with a focus on the criminal law, but he continued his philosophical studies and attempted to postpone a decision between the two fields by writing on legal philosophy.<sup>62</sup>

Having settled on an academic career by the late 1870s, Jellinek was to confront substantial opposition and continual reversals during the first dozen years of his scholarly life, largely owing to anti-Semitism.<sup>63</sup> His first book, the 1878 *Sozialethische Bedeutung von Recht, Unrecht und Strafe*, which was positively reviewed and was subsequently seen as an important step in the introduction of social scientific arguments into criminal law dogmatics, was unexpectedly rejected as Jellinek’s habilitation by the Vienna law faculty. A short manuscript on *Die Klassifikation des Unrechts*, published only posthumously, was accepted the following year, allowing Jellinek to teach as a *Privatdozent*. The same process played out in 1880-83 as Jellinek attempted to gain an associate professorship with an expanded remit that would allow him to teach state law and international law, and he was forced to write not just one but two substantial books on international treaties and federalism to attain the position. His 1882 *Lehre von den Staatenverbindungen* won the admiration of the liberal jurist and influential Austrian minister Josef Unger, who was particularly attuned to Jellinek’s difficulties because of his own Jewish background. Even Unger’s support, however, was not enough to avert a major controversy over Jellinek’s candidacy for a chair in state law and international law at the end of the 1880s, however. Besieged by opposition from the clerical faction within the law faculty, and from agitation in the press about the feared “Judaization” of the university, Jellinek held out hope that

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<sup>61</sup> Camilla Jellinek, *Lebensbild*, 12. By 1872, Adolf Jellinek suggested that Georg was beginning to act like Wagner in Goethe’s *Faust*, taking on too many philosophical interests one after the other without finishing any of them, and he encouraged his son to pick one and stay with it: Kempter, *Die Jellineks*, 177.

<sup>62</sup> On Jellinek’s university education, see *Lebensbild*, 12-22; Kempter, *Die Jellineks*, 162-190; and Keller, “Victor Ehrenberg und Georg Jellinek,” 33-34.

<sup>63</sup> The following account of Jellinek’s career path is also based on the sources identified in the previous note.

the ministry's promise of a professorship would be upheld. When in 1889 the promise was broken and a Catholic professor appointed instead, he resigned his position and, with the help of Laband, Jhering, and others, sought habilitation in Germany. After teaching briefly at the University of Basel in Switzerland, he became a full professor of public law at Heidelberg in 1890. There he settled into a highly successful career, which brought him renown as one of Germany's most important constitutional law professors, status as *Geheimer Hofrat*, service as dean of the law faculty on several occasions, and rectorship of the University in 1907.

Some of Jellinek's critics, such as Hans Kelsen, who studied with him around the time of his rectorship, complained about the adulation and superlatives heaped on him by his students and charged him with encouraging it,<sup>64</sup> but in fact he seems to have retained the kindly persona of his youth. Like his younger friends and colleagues Max Weber and Gustav Radbruch, Jellinek occasionally suffered from "nerves" and personal "crises," generally occasioned by overwork. His work was interrupted by a particularly severe bout in the mid-1870s, as he struggled to find direction, and in 1889 the death of his eldest son brought about a deep depression which, as his wife observed, would return "often and quite intensively" in the following years.<sup>65</sup> But he was also known for his sense of humor,<sup>66</sup> ambition, and independent mind: Camilla observed that no less an eminence than Jellinek's senior colleague and friend at Vienna, Carl Menger, once informed her, only half-joking, that he had first realized how uncommonly brave Jellinek was when the young associate professor voted against him at a

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<sup>64</sup> For Kelsen's criticisms, see Kempter, *Die Jellineks*, 375.

<sup>65</sup> Jellinek to Victor Ehrenberg, 20 April 1876, 26 November 1876, and 31 December 1877, in Keller, ed., *Victor Ehrenberg und Georg Jellinek: Briefwechsel 1872-1911*, hereafter cited as *E/J Briefwechsel*, esp. 253-62, 272; Camilla Jellinek, *Lebensbild*, 55-56.

<sup>66</sup> He once advised his friend Victor Ehrenberg that the latter was in need of a little Viennese frivolity, for "Es ist doch verdammt wenig, wenn man sein Leben mit nichts anderem als dem Befolgen des kategorischen Imperativs ausgefüllt hat." Jellinek to Ehrenberg, 20 September 1872, in *E/J Briefwechsel*, 155. An amusing example of what he meant is contained in a sonnet he wrote—anonously—mocking the pomposity of the Hegelian legal philosopher Josef Kohler. See *ibid.*, 382 [23 Feb 1893].

faculty meeting.<sup>67</sup> More signally, of course, by resigning in 1889, Jellinek refused to accede to his maltreatment by the Austrian education ministry, in a display of courage that forced him into a very uncertain situation with his young family.

In part, he could rely at that juncture on his already lofty academic reputation.<sup>68</sup> Admired by senior figures like Jhering and Laband, he would also subsequently exert a very substantial influence on the next generation of legal scholars. The most prominent German positivists of the Weimar period, for instance, Gerhard Anschütz and Richard Thoma, were not only assisted directly in their careers by Jellinek, but regarded his work (in the words of Thoma) as “quite determinative for [their] own scientific...interests.”<sup>69</sup> Max Ernst Mayer, who along with Gustav Radbruch would introduce “southwest German” neo-Kantian thought into criminal law and legal philosophy, near the beginning of his career in 1901 wrote to Jellinek remarking that he was “proud” of the agreement between his own just-published methodological views and Jellinek’s own. He also offered that hearing Jellinek’s lectures had been determinative for his understanding: “Erst jetzt werde ich gewahr, wie die rechtsphilosophischen Gedanken, die ich im naechsten Semester zum ersten mal vorzutragen gedenke, zum grossen Teil in jenen [Jellinek’s] Vorlesungen wurzeln.”<sup>70</sup>

Jellinek was well regarded not only in his own academic home discipline of public law, but in many neighboring areas, particularly within the social sciences. His interests and wide reading always allowed him to speak with other social scientists in an informed way about their particular subfields,<sup>71</sup> and he was viewed by his peers as being a serious contributor to sociology,

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<sup>67</sup> Camilla Jellinek, *Lebensbild*, 47.

<sup>68</sup> *Ibid.*, 46.

<sup>69</sup> Thoma to Jellinek, 10 June 1908, in NL Jellinek 1136/30; for Jellinek’s support of Anschütz, see 15 March 1900, 1136/41 and Anschütz to Jellinek, 23 December 1902, 1136/1.

<sup>70</sup> Max Ernst Mayer to Jellinek, 27 February 1901, in NL Jellinek 1136/17.

<sup>71</sup> *Ibid.*, 88.

political science, history, and legal philosophy. For instance, the historian Erich Marcks sought his expertise on several problems in the history of law and religious thought; Georg Simmel requested that he be a founding member of the German Sociological Society; and his colleague and later successor at Heidelberg, Anschütz, found himself compelled to send students with sociological questions to Jellinek, remarking with good humor that “Sie seien für solche allgemeinen... sozialwissenschaftlichen Dingen der dominus decernens ordinarius (‘d.d.o.’).”<sup>72</sup> His influence on Max Weber, both methodologically and in terms of Weber’s understanding of the state, has been shown decisively by several scholars.<sup>73</sup> Jellinek’s prestige among scholars of political science in the United States was exceptionally high, as his many American students reported to him.<sup>74</sup>

Jellinek had, in particular, a philosophically inclined temperament, which was also widely noted. He once remarked that “I live in a marriage of convenience with jurisprudence, but philosophy is my love,” a statement his wife seems to have taken remarkably well.<sup>75</sup> In the preface to Jellinek’s posthumously published collected writings, his friend Wilhelm Windelband

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<sup>72</sup> Erich Marcks to Jellinek, 26 July 1908 and 20 September 1909, in NL Jellinek 1136/17; Georg Simmel to Jellinek, 5 November 1908, in Simmel, *Briefe 1880-1911*, Gesamtausgabe vol. 22 (Frankfurt: Suhrkamp, 2005), 669; Gerhard Anschütz to Jellinek, 2 December 1905, in NL Jellinek 1136/1.

<sup>73</sup> Stefan Breuer, Breuer, Stefan. “Fachmenschenfreundschaft II: Max Weber und Georg Jellinek,” in Breuer, *Max Webers tragische Soziologie* (Tübingen: Mohr Siebeck, 2006), 294-325: 295-96 for a detailed list; Gangolf Hübinger, “Staatstheorie und Politik als Wissenschaft im Kaiserreich: Georg Jellinek, Otto Hintze, Max Weber,” in Hans Maier et al., eds., *Politik, Philosophie, Praxis: Festschrift für Wilhelm Hennis* (Stuttgart: Klett-Cotta, 1988), 143-161, here 157-58 and Section III generally; Marianne Weber, *Max Weber: A Biography*, trans. Harry Zohn (New Brunswick, NJ: Transaction, 1988), 474-78. Weber’s letters to Jellinek tell the same story. In 1896, he wrote to his future friend that working together with Jellinek was likely to be the “most important relationship” for Weber’s scholarly activities as he considered transferring to Heidelberg from his Freiburg professorship: 12 December 1896, in NL Jellinek 1136/31; occasional subsequent letters when Weber was away from the university showed their continuing intellectual exchange on such matters as the concept of the “calling,” Jellinek’s work on historical “types,” and Weber’s well-known approval of Jellinek’s work in founding the scientific study of politics: Weber to Jellinek, 24 September 1904 and 14 October 1905, in NL Jellinek 1136/31, and 27 August 1906 in MWG vol. 5, *Briefe 1906-1908* (Tübingen: Mohr Siebeck, 1990), 149.

<sup>74</sup> For remarks on Jellinek’s influence on American scholarship, see the letters to him from David Goss of Cornell and Indiana, 1136/9; Albert Bushnell Hart of Harvard, 1136/10; and Max Farrand of Yale, 1136/43. Amos Hershey of Indiana University wrote that “your reputation amongst political scientists is so great in this country that a word from you would carry much weight”: 8 May 1899, 1136/11. Jellinek also received invitations for visiting positions or lecture series from Columbia and Princeton.

<sup>75</sup> Camilla Jellinek, *Lebensbild*, 21.

confirmed that Jellinek's intense fascination with ideas from all the different disciplines was what lent him his methodological sophistication: "It was from the rich, comprehensive comparison of different scientific lines of thought that he gained the methodological schooling by means of which he gave the treatment of the general theory of the state [*allgemeine Staatslehre*] greater impetus and wider outlines [*grössere Linien*] once more." But it was above all a philosophical drive that had oriented Jellinek in his work since his student days, as Windelband rightly emphasized. Jellinek "was led into the very midst of philosophy by the burning wish to become clear on the ultimate connections [*die letzten Zusammenhänge*] within his own life's work."<sup>76</sup> As Windelband well knew, Jellinek began his university education with the intention of doing work in philosophy.<sup>77</sup> In fact, the two of them became close friends in the early 1870s when Windelband was just beginning his teaching career, and Jellinek was his philosophy student at Leipzig.

Jellinek's philosophical background therefore provides an indication of the sources of his thinking on the theory of science and on values. From the first, Jellinek sought out forms of philosophy that were critical of both speculative idealism and rigid materialism while also being receptive to natural science. Like most of the advocates of value-freedom discussed in this dissertation, he had a largely nominalistic cast of mind and placed strong emphasis on the importance of conceptual clarity. His early works left no doubt that vague analogies, images, and attempts to mix separate problems in the interest of some sort of "higher" or purportedly dialectical unity, needed to be left in the past. "The concepts for which we are searching," he

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<sup>76</sup> Wilhelm Windelband, "Zum Geleit," in Georg Jellinek, *Ausgewählte Schriften und Reden*, 2 vols. (Berlin: Häring, 1911), hereafter *ASR*, I, vi-vii. Radbruch, too, emphasized Jellinek's aesthetic and philosophical nature in a review of this posthumous collection that doubled as an appreciation for Jellinek: the essays showed, for Radbruch, Jellinek's attempt "zwischen dem, was der Beruf fordert, und dem, was das Herz erfüllt, eine Brücke zu schlagen": untitled review in *Logos* (1911-12), reprinted in Gustav Radbruch, *Biographische Schriften*, ed. Günter Spindel (Heidelberg: Müller, 1988), 21.

<sup>77</sup> See, e.g., Ehrenberg to Jellinek, 16 November 1872, in *E/J Briefwechsel*, 164.

wrote in 1882, “must however be sharp, definite, stable, and strongly demarcated from one another.... Legal concepts are always hard-edged [*kantig*]; the blurring of one into the other would be the death of science, the death of the law [*des Rechtslebens*].” Life itself may be messy, with one relationship flowing into another, but “where concepts once begin to fall into the Heraclitean flux of things, there jurisprudence has lost its field.” He explicitly equated here the presence of conceptual clarity with the degree of scientific character achieved by a given branch of knowledge.<sup>78</sup> Even from his early days, Jellinek also associated unclear thinking with political intolerance and violence: discussing theosophical speculations with his father, he rejected the speculators’ “misty sentimentality, their [attempts] to lend clear words to their unclear thoughts,” and insisted that such ideas would find their logical conclusion in the images of heretics and stakes for burning them that he called to mind. “It is not for nothing that truth (*Wahrheit*) and clarity (*Klarheit*) are rhymes!”<sup>79</sup>

Jellinek’s nominalism was lifelong and played out in his substantive work on the state as well as in his methodological reflections.<sup>80</sup> He often warned readers against mistaking collective concepts for real things. His 1879 inaugural dissertation rejected the hypostatization of a super-personal will as a “substance” acting in history, which saw as a risk of latter-day Hegelian thinking,<sup>81</sup> alongside the slightly less mystical but no less fictional notion of a national will.<sup>82</sup>

Much as he appreciated incipient sociological corrections of the picture of social relations given

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<sup>78</sup> Jellinek, *Die Lehre von den Staatenverbindungen* (Berlin: Haering, 1882), 15.

<sup>79</sup> Jellinek to Adolf Jellinek, 23 November 1872, quoted in Camilla Jellinek, *Lebensbild*, 18.

<sup>80</sup> This statement requires slight qualification: a very early piece on moral statistics from 1874 showed a tendency to accept the idea of society as a “real” actor, capable of guilt, and a temporary explicit preference for realism over nominalism in this case: “Moralstatistik und Todestrafe,” in *ASR* I, 75. A brief summary of the ways in which basically nominalistic attitudes were reflected in Jellinek’s work is Gangolf Hübinger, “Staatstheorie und Politik als Wissenschaft,” 148-49.

<sup>81</sup> Jellinek, “Die Klassifikation des Unrechts,” previously unpublished Habilitationsschrift (1879), in *ASR* I, 76-150, here 80, note 2.

<sup>82</sup> Peter M.R. Stirk, *Twentieth-Century German Political Thought* (Edinburgh: Edinburgh University Press, 2006), 30-31.

by social contract theory, he regarded some sociologists' reification of society as a "chimera."<sup>83</sup> And his magnum opus, the *Allgemeine Staatslehre*, was peppered with reminders that the state was no "real substance" or "organism," despite the nineteenth-century tradition of political organicism: the state as a collective entity was comprised, without remainder, of the results of individual acts of human will.<sup>84</sup> Jellinek maintained that a science of "last things" or fundamental realities was impossible, and that knowledge was always "knowledge for us."<sup>85</sup>

Such views were explicitly held in reaction against post-Kantian idealism, and what Jellinek saw as its tendency to replace causal explanations with mere "names" (*nomen*) and personal opinions under cover of obscure terminology.<sup>86</sup> But Jellinek was not drawn by simple empiricism, either; he preferred among natural scientists those philosophically inclined toward a form of Kantianism, such as Hermann Helmholtz.<sup>87</sup> Altogether, Jellinek was well positioned to participate in the Kant revival which began in the second half of the century. His first substantive published article, an account of "German Philosophy in Austria," argued that the materialist or vulgar positivist reaction to idealism represented by Vogt and Moleschott in the 1850s had lasted only until natural scientific research itself—the study of the physiology of human organs of perception—suggested a return "to the source of the modern philosophical

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<sup>83</sup> Breuer, "Fachmenschenfreundschaft," 308.

<sup>84</sup> Jellinek, *Allgemeine Staatslehre*, 3<sup>rd</sup> ed. (Berlin: Häring, 1914 [1900]), 145, 150ff., 161, 167, 175; see also Hans Boldt, "Staat, Recht und Politik bei Georg Jellinek," in Andreas Anter, ed., *Die Normative Kraft des Faktischen: Das Staatsverständnis Georg Jellineks* (Baden-Baden: Nomos, 2004), 13-14. This chapter will refer to the third, posthumous edition of Jellinek's principal work, but only in cases where the substance of the text was not altered from the first edition of 1900.

<sup>85</sup> Oliver Lepsius, "Georg Jellineks Methodenlehre im Spiegel der zeitgenössischen Erkenntnistheorie," in Stanley Paulson and Martin Schulte, eds. *Georg Jellinek: Beiträge zu Leben und Werk* (Tübingen: Mohr Siebeck, 2000), 315.

<sup>86</sup> Jellinek, *Die Sozialethische Bedeutung von Recht, Unrecht und Strafe* (Vienna: Hölder, 1878), 5-7.

<sup>87</sup> See the same letter of 23 November 1872, quoted in Camilla Jellinek, *Lebensbild*, 18.

spirit: the Kantian criticism.”<sup>88</sup> He endorsed this return to Kant, favoring a view of philosophy’s task as the science of sciences: the grounding and synthesizing of the separate sciences.<sup>89</sup>

No doubt he was given an impetus in this direction by his studies with Windelband, who helped him to see philosophy as a foundational epistemological science.<sup>90</sup> Windelband was the most frequently mentioned figure in Jellinek’s early correspondence, and helped make him aware of the work of Windelband’s own teacher, Hermann Lotze, among others.<sup>91</sup> Jellinek was particularly struck by Windelband’s early work, *Über die Gewissheit der Erkenntnis: eine psychologische-erkenntnistheoretische Studie*, and his inaugural lecture on the relationship of the theory of knowledge to metaphysics.<sup>92</sup> Jellinek’s early assessment was that “Windelband’s course is probably the most significant currently being given in Germany,” and that “his theory of knowledge [*Erkenntnis*] traces the most secret beginnings of our psychic activity and follows them up to the highest problems of knowledge [*des Wissens*].”<sup>93</sup> Windelband’s influence was strongest in Jellinek’s student days, some twenty years before the former’s rectoral address which we considered in Chapter 1, but the extent to which Windelband’s view of the sciences was constitutive for Jellinek is not entirely clear. In the interest of showing his reliance on Windelband, it has been recently observed that Jellinek’s early work on criminal law tended to differentiate between the social and natural sciences according to their objects or domains—much as Dilthey would do in his 1883 *Einleitung in die Geisteswissenschaften*—and that the differentiation of sciences according to *method* took place first in Jellinek’s 1892 *System der*

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<sup>88</sup> Jellinek, “Die deutsche Philosophie in Oesterreich,” (1874), in *ASR I*, 59.

<sup>89</sup> *Ibid.*, 67-68.

<sup>90</sup> Keller, “Victor Ehrenberg und Georg Jellinek,” 35.

<sup>91</sup> See, e.g., Jellinek to Ehrenberg, 20 October 1872, in *E/J Briefwechsel*, 158. Jellinek visited Lotze in the summer of 1874: see *ibid.*, 223, note 1.

<sup>92</sup> Jellinek to Ehrenberg, 29 April and 9 June 1873, in *ibid.*, 180, 191-92.

<sup>93</sup> Jellinek to Ehrenberg, 27 June 1874, in *ibid.*, 222-23.



*subjektiven öffentlichen Rechte*.<sup>94</sup> And indeed, it seems likely that Jellinek's acceptance of method as the criterion for differentiation stemmed from Windelband. However, it is far less clear that his acceptance of the Is/Ought dichotomy and the place of values in the sciences had much to do with Windelband's brand of neo-Kantianism.

One quite obvious alternative source for his commitment to the sharp separation of the factual and normative realms was, of course, legal positivism. The most thorough modern student of Jellinek's work has made a persuasive case that Jellinek's famous "*Zwei-Seiten-Lehre*" or "Two-Sides Doctrine" of the state, which holds that the state may be seen from both a juristic and a social scientific angle, owed more to Gerber and Laband than to neo-Kantianism for reasons we will examine below.<sup>95</sup> Jellinek's overall debt to these two predecessors in the content of his *Staatslehre* is extensive, although owing to their parsimony in addressing methodological questions, their contribution to his theory of legal science may well be limited to encouraging him to adopt the normative-factual split that correlated with the *Zwei-Seiten-Lehre*.<sup>96</sup> We need not belabor this connection, but it is worth observing that Laband himself clearly viewed Jellinek as an ally in ensuring that legal and factual-sociological analyses of the state were not improperly intermingled. In letters to Jellinek in the 1880s and 1890s, Laband often noted their differences on individual points of doctrine but reiterated his view that "we rest in all principal matters on the same scientific standpoint," and on one occasion called on Jellinek to demonstrate "the worthlessness of political speculations for the knowledge of legal concepts."<sup>97</sup> In his speech at Jellinek's funeral, Laband would remark that "In his modesty, the

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<sup>94</sup> Frederike Wapler, *Werte und das Recht* (Baden-Baden: Nomos, 2008), 169. Note, however, that he held the first view at least as late as 1878—in other words, well after he had studied with Windelband.

<sup>95</sup> Jens Kersten, *Georg Jellinek und die klassische Staatslehre* (Tübingen: Mohr Siebeck, 2000), 54-55, 63.

<sup>96</sup> *Ibid.*, 50-68, for an assessment of the importance of Gerber ("unser aller Meister") and Laband for Jellinek.

<sup>97</sup> Laband to Jellinek, 21 October 1895 and 6 January 1889, in NL Jellinek, 1136/15; see also, e.g., 29 June 1892 for their "complete agreement" on the "legal nature of the state" in Laband's eyes.

great man who has left us [*der grosse Verblichene*] used to describe himself as my student. He was that once [NB: Jellinek was never literally Laband's student—AJS], but the student became a colleague, the colleague a master, and this master became in turn my teacher in many respects.”<sup>98</sup>

One of the areas in which Laband could have learned from Jellinek was in the deployment of social scientific methods in the study of the state. Laband may have acknowledged their legitimacy, but he did not pursue them.<sup>99</sup> Jellinek did, however—indeed, from the beginning of his career. His first acquaintance with the field of social science was in the form of the traditional moral-political science of *Staatswissenschaft*, which he preferred to his other legal studies.<sup>100</sup> From there he became enamored of Jhering's post-constructivist approach to the law, rejecting what he saw as the focus on antiquated legal texts and the search for a “magic word” in legal interpretation instead of pursuing knowledge of the social and economic problems or transactions the law was intended to address as its “purpose” or *Zweck*.<sup>101</sup> He advised his friend Ehrenberg in 1873 to overcome the boredom of constructivist dogmatics and to “grapple, at least, with the field of social sciences [*socialen Wissenschaften*] which lies close to juridical studies—fresh life pulses there, everything there is ‘present’ [*Gegenwart*] and truth, the musty smell of past centuries doesn't cling to it.”<sup>102</sup>

Particularly impressed by his Leipzig teacher G.F. Knapp's work on “moral statistics,” demographic data relating to social and familial mores, Jellinek was persuaded of the existence of social regularities and of the need to take them into account as influences on individual actions

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<sup>98</sup> Laband, Untitled funeral address, printed in a Heidelberg newspaper (name and date unknown, but likely 14 January 1911), preserved in Nachlass Gustav Radbruch, Heidelberg HS 3716 (hereafter cited as NL Radbruch), III.F.565.

<sup>99</sup> Kersten, *Georg Jellinek*, 64-65.

<sup>100</sup> Jellinek to Ehrenberg, 5 August and 25 September 1873, in *E/J Briefwechsel*, 197, 201; see also Bleek, *Geschichte der Politikwissenschaft*, 159-160.

<sup>101</sup> Jellinek to Ehrenberg, 30 December 1873, in *ibid.*, 209.

<sup>102</sup> *Ibid.*, 210.

in a criminal law context.<sup>103</sup> His work in the 1870s was marked by an attempt to contribute to “the founding of a sociology [*Sociologie*]..., a science of the future which possesses the closest contact with the study of law and politics.”<sup>104</sup> This work could not be described as “value-free”; rather, it was informed by the meliorative attitudes customary in the *Sozialpolitiker* of the 1870s. Jellinek wanted to replace the older, Hegelian theories of punishment in criminal law as the logical response of society to the negation of its norms through retribution. Instead, he proposed an approach grounded in the empirical-causal study of human actions influenced by social position and authority, seeking both social reform—a shift in the purpose of punishment to deterrence and betterment of the criminal—and the replacement of philosophical speculation with positive science conceived initially in Comtean terms as the final “stage” in scientific development.<sup>105</sup>

Although he would no longer take an explicitly evaluative, social-reformist stance in his writings of the 1880s and after, Jellinek continued to digest social scientific literature with impressive thoroughness. He was especially well informed on the development of economics, in its “Austrian,” German “historical,” and even Marxist forms, as his voluminous correspondence with an Austrian friend, Ludwig Felix, makes clear. He occupied an intermediary position in his views on the economic *Methodenstreit*, as he wrote in a letter to Lujo Brentano in 1889,<sup>106</sup> and recommended Menger’s *Grundsätze der Volkswirtschaft* to Felix during the course of their correspondence about the theory of economic value.<sup>107</sup> Throughout the mid-1890s, Jellinek reported on his critical engagement with Marx and with socialist or proto-socialist writers

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<sup>103</sup> Keller, “Victor Ehrenberg und Georg Jellinek,” 36-37.

<sup>104</sup> Jellinek to Ehrenberg, 26 July 1878, in *E/J Briefwechsel*, 278.

<sup>105</sup> Jellinek, *Sozialethische Bedeutung*, 3-5; Keller, “Victor Ehrenberg und Georg Jellinek,” 50; Kempter, *Die Jellineks*, 191-95.

<sup>106</sup> Jellinek to Brentano, 28 May 1889, in Brentano Nachlass, Bundesarchiv Koblenz, 1001/29.

<sup>107</sup> Jellinek to Ludwig Felix, 2 July 1894, in NL Jellinek, 1136/43.

ranging from St. Simon to Werner Sombart,<sup>108</sup> though he clearly preferred the reformist economists Knapp, Adolf Wagner, Heinrich Herkner, and Brentano. And he was an early reader of Max Weber, recommending Weber's work on ancient agrarian history to Felix.<sup>109</sup> All in all, however, it is not likely that his views on value-judgments and objectivity were much altered by any of this literature, for he did not make use of any of it in elaborating his methodological views in published writings. The roots of his affiliation with value-free social science were not, in other words, in the soil of his own reading in sociology and economics.

Before we examine these roots more clearly, it remains to place Jellinek politically. Although there is some debate about Jellinek's politics regarding the prominence he accorded to the state, there is general agreement that throughout his life Jellinek was a moderate liberal. In his student days he moved in liberal democratic and constitutionalist circles, and his early political views were shaped at least in part by opposition to the clerical and aristocratic right.<sup>110</sup> He shared the optimistic nineteenth-century liberal attitude toward progress, civilization, and the heritage of the Enlightenment, admired technological and scientific development, saw a role for state social policy and social insurance, and consistently worked to further international understanding and peace through international law and tribunals.<sup>111</sup> He was, however, not inconsistently for his day, a moderate nationalist who admired Bismarck's unification of Germany from the first, and he supported limited imperialist ventures much like his colleagues

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<sup>108</sup> See letters of Jellinek to Ludwig Felix of 20 June 1894, 8 January, 15 March and 20 October 1895, in *ibid.*

<sup>109</sup> Letters of 14, 16, and 24 May 1896, in *ibid.*

<sup>110</sup> Kempter, *Die Jellineks*, 164-65.

<sup>111</sup> On progress and civilization, see Camilla Jellinek, *Lebensbild*, 38, 89; Keller, "Victor Ehrenberg und Georg Jellinek," 28-29; Kempter, *Die Jellineks*, 174-75. Never liking in his travels to stray far from rail lines, as the bearer of civilization, according to his wife, Jellinek also shared his brother Emil's love for motor cars, much to the dismay of Max Weber (see Weber, *Briefe 1906-1908*, 513-14). (Emil Jellinek, incidentally, the Austrian consul in Nice who worked early on with Daimler Motors, named the "Mercedes" after his daughter and became a very rich man.) Aside from technological progress, Jellinek was also in favor of greater rights for women, and was one of the earliest to allow female students in his lectures. On social policy, see e.g. the conclusion of Jellinek's 1894 address, "Die Entstehung der modernen Staatsidee," in *ASR II*, 60-61; on his internationalism, see Keller, 110-12 and Kempter, 339-41.

Weber and Friedrich Naumann and shared Weber's early anti-Slavic attitudes.<sup>112</sup> A constitutional monarchist during his adult life, Jellinek followed Tocqueville in accepting the inevitability of social leveling and democracy but remained "ambivalent" about democratic institutions, and his support for parliament was tempered by opposition to ministerial responsibility and suspicion of party politics.<sup>113</sup> He saw the socialist movement as utopian and was concerned by its potential for violent populism, although he read and took socialist writers seriously as social critics.<sup>114</sup> He has been regarded as a typical supporter of the "etatist" tradition in German political thought, placing state power at the center of political life, and some have even suggested that he subordinated the individual to the state as embodiment of the national collective.<sup>115</sup> This is not, finally, a plausible reading of Jellinek's political attitudes; the entire tenor of his life's work was to emphasize the ways in which the modern state could limit itself to respect the rights and the personal and economic freedoms of individual citizens, and he was passionately committed to freedom of thought.<sup>116</sup> In short, Jellinek fit easily within the tradition of national liberalism, and, without ever joining the National Liberal party, he not infrequently addressed party meetings beginning in the early 1890s.<sup>117</sup> As Michael Stolleis has correctly

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<sup>112</sup> Keller, 106-107. Camilla Jellinek observes that her Austrian husband, then a student in Heidelberg, had tried to enter the Prussian army to fight for German unification in 1871 but was restrained by his parents: *Lebensbild*, 13.

<sup>113</sup> Andreas Anter, "Modernität und Ambivalenz in Georg Jellineks Staatsdenken," in Anter, ed., *Die normative Kraft*, 42-44; Keller 116-17.

<sup>114</sup> See the letters quoted in Camilla Jellinek, *Lebensbild*, 99.

<sup>115</sup> Kersten, *Georg Jellinek*, argues throughout that Jellinek is to be seen as a figure in the etatist tradition stretching from the eighteenth century to Josef Isensee; for Jellinek as anti-individualist, see Hugo Sinzheimer, *Jüdische Klassiker der deutschen Rechtswissenschaft* (Amsterdam: Hertzberger, 1938), 222-24, an interpretation which may have been colored by the desire to defend Jellinek against Nazi stereotypes of Jews as anti-"social," and Wapler, *Werte und das Recht*, 236, which upholds the same view but with a negative valence instead. Breuer, "Fachmenschenfreundschaft," persuasively disputes Jellinek's placement in the etatist tradition absent substantial qualifications, 317-18.

<sup>116</sup> The defense of individual rights is at the center of the earlier of his two most important works, the 1892 *System der subjektiven öffentlichen Rechte*, and plays a prominent role in the *Allgemeine Staatslehre*. We will return to Jellinek's views on academic freedom of thought below.

<sup>117</sup> For Jellinek and National Liberalism, see Anter, "Modernität," 42; Keller, 106-7; and Jellinek to Ludwig Felix, 2 January 1893, noting for the first time that he has held a lecture for the Heidelberg chapter of the "nationalliberalen Parteiversammlung": NL Jellinek, 1136/43.

summarized, “Jellinek was a liberal, idealistic man, attuned to the creation of synthesis and harmony,”<sup>118</sup> the sort of man who would have become a cautious *Vernunftrepublikaner* had he lived into the Weimar era.

#### **b) Jellinek on Values, Value-Freedom, and Objectivity in Social Science**

Although *personally* inclined to seek harmony where he could find it, at the *methodological* level Jellinek had more in common with the “agonistic” liberalism of his younger friend, Weber. In fact, Jellinek’s position on value judgments in social science is structurally similar to Weber’s to a remarkable degree, a fact that deserves more notice than it has received. We may outline it as follows before exploring its component parts in greater detail. Confronted with the situation described at the end of Section I, and with the solid grounding in social scientific studies and Jhering’s “interest”-based jurisprudence, which we have just examined, Jellinek accepted the need for jurists to consider social and political factors in their theoretical work on the state. He recognized that this admission would necessarily open the door to consideration of value judgments regarding which interests or political actors should be taken into account, and how. Unlike many of his contemporaries among the *Sozialpolitiker*, however, Jellinek regarded value judgments as only subjectively valid, mutually conflicting, and impossible to arbitrate using the tools of science. He was therefore faced with the theoretical problem of separating true *knowledge* of the law and of the state from political assertion and opinion, which his positivist predecessors had tried to solve by the exclusion of value judgments in the first place.

Jellinek’s most famous solution to this problem was the *Zwei-Seiten-Lehre*, which accorded both pure juristic methods and pure social scientific methods their place by requiring the strict separation of the normative and factual “sides” of the state and state law but giving both

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<sup>118</sup> Stolleis, *Public Law in Germany*, 441.

“sides” their due. Although he is best known for this doctrine, by itself it would have begged the question, since it did not address the underlying problem of what preserved the validity of knowledge on either “side” of the divide. The *Zwei-Seiten-Lehre* was essentially useful as a defense against the sociological reductionism of those who wanted to equate the law and the state with raw power relations; it differentiated Jellinek from his colleague Laband only in that he insisted on including social scientific considerations of power, rule, and social influence in the *same* scholarly work as purely juristic concerns. And indeed, the doctrine needed to be supplemented by examination of the ways in which the two “sides” *related*, if it were not to fall victim to the growing criticism that legal holdings obtained by juristic construction alone rendered the law inadequate to current social needs. Consequently Jellinek adduced his doctrine of the “normative power of the factual” to explain the *fact* of interrelation between the normative and factual spheres.

These issues have been the focus of discussion of Jellinek’s methodological position, but there remains the question faced not just by jurisprudence but by all social science that acknowledges the inevitability of subjective value judgments: the possibility of objectivity. Jellinek did not ignore this problem, and his answer comes through in a variety of his writings and public speeches. He believed that in the final analysis, the choice of value-based presuppositions behind scholarly work was a matter of commitment (*Bekennen*)—not of an arbitrary and scattershot willfulness, but of accepting an internally consistent worldview which had proved itself over time, and with which one’s other commitments must be in conformity. Since there was a plurality of such worldviews on hand, the mechanism whereby scholarly stances based on such consistent worldviews were (hopefully) led to greater certainty in social scientific knowledge was, for Jellinek, academic freedom. Set apart from political interference

and depending on a decentralized, federal system of university governance that allowed different views to flourish and compete, scholars could rely on their own free exchange of ideas and the process of history itself to lead, in Jellinek's liberal and progress-oriented vision, to improved operational understanding of the world.

Although the similarity of this position to what has come to be seen as the Weberian vision is striking, Jellinek – the as the oldest figure considered in this dissertation – certainly did not rely on the methodological positions elaborated in the *Werturteilsstreit* after 1900 for his understanding of values and value-freedom. Nor, as we have seen, did he draw it from the sociological and economic literature of the last quarter of the nineteenth century, which generally constituted the position against which the idea of value-free science was directed (see Chapter 2). So what were the fundamental sources of Jellinek's attitude toward values?

In Jellinek's case, his ideas about the nature of values were formed early on, at latest by the mid-1870s, and the process had much to do with his view of philosophy and natural science. Fascinated by philosophical problems, the young Jellinek nevertheless showed increasing frustration in the 1870s with the hope that philosophy could lead to knowledge of the true, the good, and the beautiful. As he completed his degree in the subject in 1871-72, he often remarked on what he saw as its negative impact on his life—studying philosophy was a “corrosive process” [*Zersetzungsprozess*] and it seemed to him that it “killed every fine original feeling with the icy breath of reflection.”<sup>119</sup> His short 40-page dissertation on Schopenhauer and Leibniz argued that the two actually held many similar basic premises but took them in very different directions largely because of their personal worldviews, and that “the cause [*Ursache*] of their *practical* philosophy cannot lie in the metaphysical dogmas upon which they wish to erect the

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<sup>119</sup> Jellinek to his parents, 1 December 1871 and 27 June 1872, quoted in Camilla Jellinek, *Lebensbild*, 16-18.



edifice of their systems.”<sup>120</sup> Rather, he called attention to their social circumstances and above all their personal temperaments to account for their different practical philosophies, and he quoted with approval the remark by Fichte that proved so popular among our protagonists, that “which philosophy a man chooses depends on what kind of man he is.”<sup>121</sup> By 1877, as he confessed to Ehrenberg, he had no faith that philosophy could offer answers, and he could no longer in good conscience consider teaching the subject to students. “The older I get, the more exhaustively I occupy myself with the old unsolved, unsolvable problems, the deeper I feel the impossibility of approaching the eternal, the absolute, the true, in any way other than by guessing; the more I realize that every apodictically expressed proposition about the last things [*die letzten Dinge*] is necessarily a lie.... The philosophical signature of our time is skepticism.”<sup>122</sup>

Windelband suggested that in this regard, Jellinek was enveloped by the “agnostic current” of the time in which he studied, and “that all his life he skeptically confronted all attempts at scientific metaphysics, and modestly committed the satisfaction of the metaphysical needs which no one could have possessed more than he, to personal convictions [alone].”<sup>123</sup> In this respect, not unlike his younger contemporary Tönnies, Jellinek was marked by the climate of natural scientific “positivism” of his youth without ever adopting it as his sole intellectual habitat. His work in the 1870s reflected his belief that it was time to put the “phantasms” and “metaphysical orgies” of the past to rest, and that instead “the best criterion for any philosophy is

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<sup>120</sup> Jellinek, “Die Weltanschauungen Leibniz’ und Schopenhauers: Ihre Gründe und Berechtigung. Eine Studie über Optimismus und Pessimismus,” [1872] in *ASR I*, 5. Italics added.

<sup>121</sup> *Ibid.*, 16; also 32, 35, 40. Jellinek continued to return to the Fichte quotation throughout his life, calling it “Fichte’s profound utterance” in the 1892 *System der subjektiven öffentlichen Rechte*, 2d ed. (Freiburg im Breisgau: Mohr Siebeck, 1905 [1892]), 13 n.1, hereafter *System*, and “Fichte’s immortal word” in his memorial speech for the Grand Duke of Baden in 1907: “Grossherzog Friedrich I. von Baden...Gedächtnisrede,” in *ASR I*, 378.

<sup>122</sup> Jellinek to Ehrenberg, 4 January 1877, in *E/J Briefwechsel*, 267.

<sup>123</sup> Windelband, “Zum Geleit,” in *ASR I*, vii.

its relationship to positive, particularly natural, science. No genuine philosophy can stand in opposition to it.”<sup>124</sup>

Jellinek preferred to treat questions of values and “practical-philosophical” orientation naturalistically as empirical-psychological givens.<sup>125</sup> He was enough of a Kantian to insist that the world of the individual psyche or *Geist* was not simply reducible to an epiphenomenon of physical states of the human organism. The physical world, the domain of causality and “blind mechanism,” contained no norms, and could not: only “in the pure region of thought does the perception of value-differentiations of what is [*das Seienden*] arise; only here are criteria [*Maßstäbe*] for assessing reality created!”<sup>126</sup> But he did not believe that this “creation” was entirely rational or that the human will could be directed in its goals by reason. “I know that in all human things there is no absolute measure [*Maß*],” he wrote his father in 1886 or 1887. “Each [human] subject is, with his historically conditioned subjectivity (as the sophists were already aware), the only possible measure [*Maßstab*] of things.”<sup>127</sup> He refused, consequently, to teach that there were universally valid philosophical solutions to any problems which required that a normative judgment be made, including in legal philosophy. Given the chance that same year to suggest requiring that students take a course in legal philosophy—one area of his own teaching remit—Jellinek declined, for, as he said, “There are no generally recognized doctrinal [*dogmatische*] solutions to legal philosophical problems. Such solutions must be worked out by each individual who has the talent for it at all; a philosophical system must be lived [*erlebt*], not

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<sup>124</sup> Jellinek, notes “Aus einem Notizbuch,” dated to 1871 and 1877 respectively, in *ASR I*, 168, 171-72.

<sup>125</sup> See, e.g., Jellinek, *Sozialethische Bedeutung*, 37-42.

<sup>126</sup> Jellinek, “Klassifikation des Unrechts,” 87. See also *Allgemeine Staatslehre*, 332.

<sup>127</sup> Quoted in Camilla Jellinek, *Lebensbild*, 10. Wapler also observes that his Kantianism did not extend beyond the separation of the worlds of causality and practical moral life to the acceptance of objectively valid norms of any sort: Wapler, *Werte und das Recht*, 166.

learned by rote.”<sup>128</sup> Nor was this situation merely temporary, awaiting further development of a scientific philosophy or ethics. As he remarked in 1892, there simply was “no theoretically compelling proof of any basic ethical position [*ethische Grundanschauung*], which is to a certain degree always a matter of not-further-deducible personal conviction.”<sup>129</sup>

The upshot of these early conclusions was to set Jellinek in the camp of those who maintained that value judgments were unavoidably subjective and not capable of determination by scientific or reasoned efforts.<sup>130</sup> His sense of the limits to “knowledge” of morals, and his separation of theory and practice, were visible already in his first book.<sup>131</sup> People naturally looked to the new social sciences for answers in the pursuit of satisfying social needs, he observed. But “giving the desired answer does not lie in the domain of science itself, for it can and wants to know only what is and whereby it is, nothing more. It is much more the work of the practical, purposive [*zweckbewusst*] mind to apply the results won on the theoretical path towards its goals. In this respect it is indeed a contradiction to speak of a practical *science*.”<sup>132</sup> He emphasized that it was a mistake—commonly made by the speculative metaphysicians—to claim the existence of a teleologically oriented social science, forgetting that human purposes must be exogenously supplied, and that “absolute knowledge” of universally valid purposes would be necessary for this to be a legitimate claim.<sup>133</sup> “So long, however, as the existence of such a possibility [of gaining knowledge of universally valid purposes] is more than problematic,

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<sup>128</sup> Jellinek, “Gutachten, betreffend die Stellung der Staatswissenschaften, der Rechtsphilosophie und des Völkerrechts” [for the University of Vienna, 1887], in *ASR I*, 305. He had long thought as much, having written in 1870 that “we understand only that which we experience. We can only grasp those spiritual and psychic happenings which we have come to know in ourselves.” In “Aus einem Notizbuch,” *ASR I*, 165.

<sup>129</sup> Jellinek, *System*, 11.

<sup>130</sup> We have emphasized his early views to make clear that Jellinek’s value relativism did not stem from the Heidelberg milieu of his later work, but should note that he did not change his opinion; see, for but one of very many examples in the *Allgemeine Staatslehre*, 21.

<sup>131</sup> Kersten, *Georg Jellinek*, 96, observes this as well.

<sup>132</sup> Jellinek, *Sozialethische Bedeutung*, 13. Italics added.

<sup>133</sup> *Ibid.*, 13-14. See also a later statement in *Allgemeine Staatslehre*, 262.

social science will have to be on guard against pronouncing unconditional value judgments.” Otherwise empirical social science would risk suffering scholars to absolutize their own “prejudices” or prejudgments to the level of facts.<sup>134</sup> Law was in a special position of delivering judgments based on applied knowledge, having like medicine an active and therapeutic role, but empirical social science was to avoid making “value judgments” altogether.<sup>135</sup>

This most certainly included political science, as Jellinek developed it. As he stated classically in the introduction to the *Allgemeine Staatslehre*,  
As absolute goals can only be demonstrated only by the route of metaphysical speculation, an empirical political science complete in itself and invested with the general power of conviction is not possible. Only relative political investigations can attain scientific value, that is, such as hypothetically take a certain goal to be achieved, but which must acknowledge the possibility of different teleological judgments. As a rule, for this reason, political investigations come by a partisan character.... Even a cursory glance at the political literature teaches that the difference between worldviews, between convictions about the final goals of human communal life, determines—often unconsciously—the direction of a very large part of political research.<sup>136</sup>

The partisan character Jellinek attributed to the value judgments that lay behind the direction of scholarly investigations in the social sciences was a reflection of his basically antinomian vision of *Weltanschauungen* or value systems. That is to say, just like Weber, the much less personally pugnacious Jellinek saw the world as a stage for the conflict of irreconcilable ideals. There could never be agreement on a single set of human values; indeed, even in a limited scientific area such as the definition of the state, no ultimate agreement was possible because different definitions rested on mutually conflicting and rationally

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<sup>134</sup> Ibid., 13-14. A good instance of this, Jellinek observes, is provided by the claims about laws of inevitable historical development which are supposed to provide practical orientation but which in reality simply rest on the authors’ “undemonstrable presuppositions” and insufficient knowledge of the facts: *Allgemeine Staatslehre*, 28-29.

<sup>135</sup> Ibid., 14. Jellinek uses the word *Werturtheile* here in 1878.

<sup>136</sup> Jellinek, *Allgemeine Staatslehre*, 13-14. NB: this passage (which is also cited by Arnold Brecht, *Political Theory*, 220) appeared in the 1900 edition in the same form, and was read by Max Weber during his convalescence prior to his methodological writings of the years 1903-1907.

undemonstrable “metaphysical principles.”<sup>137</sup> His account of the different attitudes toward the proper purposes and goals of the state (including utilitarian, welfarist, libertarian, and others) reflects their different and sometimes mutually exclusive value-orientations.<sup>138</sup>

In a much discussed 1907 public lecture, “Der Kampf des alten mit dem neuen Recht” (The Struggle of the Old Law with the New), Jellinek expanded on this issue. Lawyers were familiar with the problems raised by the conflict of recently passed laws with older customary and statute law, or between parties in press and parliament on the content of new legislation, he observed; and only seven years after the official introduction of the Civil Code his audience would not have been at a loss for examples. The topic of his address was not the conflict of individual laws, however, but of entire legal orders. A difficulty recognized already in ancient Greece in the *Eumenides*, according to Jellinek, there had been numerous instances of it ever since, from the imposition of new laws on conquered lands, to the contest for supremacy between church and state law in the middle ages, to the tensions between feudal-patrimonial and contract-based legal orders within the modern state.<sup>139</sup> Like all other normative orders or value systems, legal orders were ultimately founded on separate and irreconcilable basic principles that were regarded by their adherents as making claims to exclusive validity and legitimacy. “Since they rest, however, on opposing principles and factually want to regulate the same domains, they must necessarily fall into conflict with each other.”<sup>140</sup> From the perspective of each, the extension of the opposing legal order by a judge or legislative body appeared as non-legal, as an act of *Willkür* or arbitrary will. Describing a situation not unlike the conflict of Kuhnian paradigms, Jellinek observed that their partisans could not understand each other because they

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<sup>137</sup> Ibid., 228.

<sup>138</sup> Ibid., Ch. 8, esp. 239-250.

<sup>139</sup> “Der Kampf des alten mit dem neuen Recht: Akademische Rede.” Heidelberg: J. Hörning, 1907. Reprinted in *ASR I* without its initial paragraph; here 397-403, 404-416 for discussion of these examples.

<sup>140</sup> Ibid., 396.

spoke different, incommensurable languages. “Since they, as it were, speak different languages, possess their own sphere of ideas [*Ideenkreis*] which is not recognized in its foundations by the other, they do not understand each other and cannot understand each other. In the struggle of intellects there is no mutual persuasion.” The literature and arguments of both sides seemed designed only for their own previously convinced partisans. It did not solve the theoretical problem to state that the “new” law tends by definition to replace the old, for the real issue was that “not statute against statute, but idea against idea, principle against principle, stand here in bitter conflict,” and old viewpoints could often be revitalized.<sup>141</sup> Any “eternal peace” between the two was “entirely excluded” because of their respective claims to supremacy; “one can place oneself in only one standpoint or the other, however the respective practical solutions may turn out.”<sup>142</sup>

Naturally, this situation entailed difficulties for anyone upholding the possibility of a genuine science of the law. Jellinek was an advocate not only of legal science, but of an explicitly related social science of the state, each of which confronted somewhat different challenges in the face of the stipulated subjectivity of all normative claims. In order to examine how he dealt with this issue, we need to take in turn his account of the methodological grounding of state law and of the social theory of the state—both “sides” of the *Zwei-Seiten-Lehre*—and to see how they belonged together.

The juridical science of the state was secured in its objectivity in a way indebted both to legal positivism and to neo-Kantianism: a strict separation of juridical from non-juridical considerations paralleling the distinction between Ought and Is. In his earliest work on state law in the 1880s, Jellinek expressed concern about the threat of the “continual commingling of the

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<sup>141</sup> Ibid.

<sup>142</sup> Ibid., 404.

political with the juridical, which is equally ruinous for the clear knowledge of the one as much as of the other.”<sup>143</sup> A strenuous effort to separate the two would not lead to mere scholasticism, as Otto von Gierke alleged. Gierke’s qualms would be justified if the juridical method was the only approach to the state allowed, but Jellinek disclaimed this as analogous to believing that private law alone can explain all of social and economic life. “The law is but one side of the state, for the investigation of whose whole extent and content almost all the sciences must work together.... [But] *within* the theory [*Lehre*] of the state, within *Staatswissenschaft*, the law is assigned a position that is as sharply demarcated as possible.”<sup>144</sup> Jellinek credited Gerber, among others, with showing the need for the separation,<sup>145</sup> but he also went beyond his legal positivist predecessors to call in 1892 for a justification of the theory-practice split on the basis of epistemological reflection. “Without an exact demarcation of the world of juristic concepts from other areas of knowledge, a thriving investigation of the foundations of state law is impossible,” and controversy will persist until a new Kant has arisen to offer jurisprudence “a critique of the juridical power of judgment.”<sup>146</sup> Jellinek aimed to work towards, if not himself to offer, such a critique.

In its most extensive form, in the *Allgemeine Staatslehre*, his development of this justification did have a notably neo-Kantian tinge. He observed that “from the enormous, incalculable tally of human social actions, a part is separated out... and integrated into a unity in the consciousness of the political actor as well as the researcher and appraiser.”<sup>147</sup> He did not,

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<sup>143</sup> Jellinek, *Lehre von den Staatenverbindungen*, 7.

<sup>144</sup> *Ibid.*, 9.

<sup>145</sup> Jellinek, *Allgemeine Staatslehre*, 63-64.

<sup>146</sup> Jellinek, *System*, 13.

<sup>147</sup> Jellinek, *Allgemeine Staatslehre*, 137.

however, develop this notion in the direction of the Rickert-Weber notion of value-relevance,<sup>148</sup> and in fact it was becoming increasingly common around the turn of the century for even non-Kantian practitioners of *allgemeine Rechtslehre* to insist that the state could be approached from many different perspectives.<sup>149</sup> What differentiated Jellinek from them,<sup>150</sup> and helped open a line of Kant-influenced legal philosophy that would reach its fruition in Hans Kelsen, was his conception of the law/politics divide as a distinction between two types of sciences classified according to their methods: what the *Allgemeine Staatslehre* referred to as *Normwissenschaften* and *Kausalwissenschaften*, sciences of norms and causal sciences.<sup>151</sup>

It was *not* that political or social analyses of the law were ignorable or even illegitimate, as critics accused the legal positivists of believing; legal norms could certainly be studied as “a factual element in popular life [*Volksleben*]” by those conducting “legal- and economic-historical investigations, social-political critique[s] of given conditions, etc.”<sup>152</sup> But such approaches could only consider the *factual* effects of law according the causal-empirical method, which by itself could say nothing about the *validity* of law as a system of norms. Only the juridical method, as a *Normwissenschaft*, could be used to study law in this manner.<sup>153</sup> “The doctrinal content of legal norms can be cultivated only through the art of abstraction from legal phenomena and of deduction from found norms, such as practiced exclusively by jurists,” he wrote in 1900.<sup>154</sup>

*Normwissenschaft* did not and could not, as we have seen, signal a science capable of generating

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<sup>148</sup> There are only four references to Rickert in the *Allgemeine Staatslehre*, none of which deals with his value-theoretical approach to the cultural sciences—a term which in fact Jellinek disclaimed on the first page of the book in favor of the more traditional term *Geisteswissenschaften*.

<sup>149</sup> Anter, “Modernität und Ambivalenz,” 38.

<sup>150</sup> Kersten, *Georg Jellinek*, 91.

<sup>151</sup> See especially Jellinek, *Allgemeine Staatslehre*, 19-21.

<sup>152</sup> *Ibid.*, 20-21.

<sup>153</sup> As Oliver Lepsius points out, this insistence on legal science as a “science of norms” differentiates Jellinek from positivist writers like Laband who preferred to see *Rechtswissenschaft* on the model of a natural science of causality: “Georg Jellineks Methodenlehre,” 316.

<sup>154</sup> Jellinek, *Allgemeine Staatslehre*, 51. See *System*, 3, for another (in that case, implicit) endorsement of constructivist methods on the purely legal “side.”



normative results out of itself; rather, in effect, it was the equivalent of what Jellinek referred to in political science as “relative” or “hypothetical” investigations<sup>155</sup> which took its starting point in foundational normative axioms that were exogenously given to the jurist. “It is not the task of jurisprudence to determine the way the state is in itself [*das An-Sich des Staates*; by which Jellinek means its real empirical existence, not any sort of noumenal reality], but much rather to order the given [*das Gegebene*] according to definite purposes and viewpoints, and to subject it to a judgment according to the abstract norms of law. Legal science is therefore a *Normwissenschaft*, akin to logic, which teaches us not how things are, but rather how they must be thought through in order to produce a knowledge without internal contradictions.”<sup>156</sup> The science of the law is, then, essentially to be seen as analogous to that of any other normative order, such as an ethical system or political ideology: it rests on certain basic principles, and may be treated scientifically as a system of norms by using logic to move from one proposition to another, to ensure its internal consistency thereby, and to render judgments without introducing arbitrary social or political value judgments.

Thus far, Jellinek would seem to have affirmed positivist and constructivist methods wholesale. But in all of his discussions of *Rechtswissenschaft* as an objective science of norms, he immediately qualified this description by observing that law, like any normative system, necessarily had to rest upon non-normative, factual foundations. Oliver Lepsius nicely summarizes Jellinek’s position: the “givens” of the factual level, of the Is as opposed to the Ought, “form the basis for the normative constructions [*Konstruktionen*], make them possible, and limit them. The legal level is indeed dependent on them as its point of departure, but then independent in its juristic validity. Laws are therefore of a normative nature, which, however,

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<sup>155</sup> See above.

<sup>156</sup> Jellinek, *Allgemeine Staatslehre*, 138.

would be meaningless without factual foundations.”<sup>157</sup> Any given legal problem might find an objective solution within the given system of norms—but carry the line of argument far enough back, and the risk of either infinite regress or of a hidden, arbitrary decision to accept a certain legal order as legitimate became apparent. The objectivity of the law as a science could be maintained only if there were an equally objective *social- or “causal”-scientific* account available of *what the given axiomatic grounds of a legal order were in fact*. If all legal scholars could agree that one particular set of basic axioms, one legal order, was factually “given,” or accepted as the source of the system of legal norms, then they could all agree on what its logical consequences would be in any particular case without an element of subjectivity entering in. There must, then, be a point at which the normative and factual levels were connected, without their becoming intermingled or confused.<sup>158</sup> Here Jellinek’s doctrines of the “normative power of the factual” and of sovereignty came into play.

From the beginning, Jellinek had insisted that there was a difference between separating Is and Ought to avoid confusing indicative and imperative propositions, and disallowing any connection between the two.<sup>159</sup> He always saw the social or political “side” of the state, and the social scientific methods for studying it being as more than a mere supplement to the juristic “side.”<sup>160</sup> In the *System der subjektiven öffentlichen Rechte* and the *Allgemeine Staatslehre*, he suggested that the connection between the sides lay not in raw power or force imposing law, but in the psychological states of the people who together made up the national state and the

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<sup>157</sup> Lepsius, “Georg Jellineks Methodenlehre,” 318.

<sup>158</sup> Kersten, *Georg Jellinek*, 95, rightly notes that it is strange that Jellinek was often criticized for allowing the juristic and social theories of the state to be presented with no connection to one another: while he made strenuous efforts not to mix them, he explicitly acknowledged their connection. Indeed, as we are arguing here, the connection was an essential underpinning for Jellinek’s argument for the objectivity of the juristic side of the *Staatslehre*. Although not noted by Kersten, one such critic is Hans-Joachim Koch, *Seminar: Die juristische Methode im Staatsrecht* (Frankfurt: Suhrkamp, 1977), 67.

<sup>159</sup> An especially clear statement is *Lehre von den Staatenverbindungen*, 9-11.

<sup>160</sup> E.g., “Klassifikation des Unrechts,” 122; *System*, 18; *Allgemeine Staatslehre*, 12.

community regulated by the state. Their wills and purposes (*Zwecke*) were the factual grounding for the most basic axioms from which the entire system of legal norms branched off.<sup>161</sup> In what he labeled “the normative power of the factual,” Jellinek called attention (not unlike Tönnies, as we have seen), to the tendency of habitually performed actions to generate a psychological sense of normative force. “Man considers that which always surrounds him [*das Umgebende*], that which he continually perceives, that which he uninterruptedly practices not only as a fact, but rather also as a norm for judgment,” by which he judges deviations from standard practice as foreign to him, and this was true of all “values” or value spheres, including in daily life as well as ethics or law.<sup>162</sup> Such a tendency could be observed in the development of children, and throughout human history, Jellinek argued, obviating the need to presume any special law-creating “act” of the *Volksgeist* or any other collective entity beyond one of the commonest human psychological predilections. And it explained not merely the origin of modern law in customary law, but its continuing authority.<sup>163</sup> Part of the purpose of the “social theory of the state” was consequently to provide a persuasive social scientific account of how groups of people came to agree on basic rules through this process, with attention to how their goals and values shifted over time, bringing the law with them.<sup>164</sup> Again, this was not the claim that the Ought of law could be “derived” logically from the Is of factual acceptance, but that social scientists could

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<sup>161</sup> Lepsius, “Georg Jellineks Methodenlehre,” 319, suggests that Jellinek treats common purposes as the fulcrum of connection between the normative and the factual in the *System*, and factual agreement among wills in *Allgemeine Staatslehre*, but both ideas are present in both works: see, e.g., *Allgemeine Staatslehre*, 333 for the centrality of *Zweck* or purpose in law.

<sup>162</sup> Jellinek, *Allgemeine Staatslehre*, 337-38.

<sup>163</sup> *Ibid.*, 338-44.

<sup>164</sup> *Ibid.*, 353ff. on Jellinek’s discussion of the tensions between conservative and progressive tendencies in the law, and the constant change that it underwent in response to social changes. Hugo Sinzheimer rightly recognized that Jellinek rejected the notion of a closed or gapless system of law unresponsive to changes in social purposes: *Jüdische Klassiker*, 210-11. (Jellinek speaks of the “false dogma of the closedness of the legal system” in *Allgemeine Staatslehre*, 353.) For an assessment of how well Jellinek actually employed social scientific and especially sociological theories to these ends, see Kersten, *Georg Jellinek*, 151-56; the results are mixed, though this has no necessary bearing on his theory.

establish the fact of acceptance which the jurist could then take as a “given” from which to derive legal conclusions in a constructivist manner.

Jellinek’s account of state sovereignty offered another location for conceiving of how factual realities might connect with the system of legal norms. The most obvious factual grounding for a legal order lay in the claims to authority by the state, and Jellinek’s positivist predecessors like Laband had simply accepted the fact of state sovereignty as the legitimate source of all law.<sup>165</sup> This practice tended to equate the power of *Herrschaft* with legality in an unreflective way, which not only irritated the critics of positivism, but also ignored the Hobbesian problem of how a sovereign power (the state) could be bound by law if it were also the source of law. Rejecting natural law for its lack of realism, like virtually all of German legal opinion in his day, Jellinek agreed that the sovereign power to make law rested with the state, and positivization through proper enactment alone made law legitimate.<sup>166</sup> However, where the political contests surrounding state promulgation of the legal order were entirely absent in Laband, Jellinek made full use of them to explain the ways in which the state was constrained to operate under the rule of law. Its sovereignty meant possession of unlimited power, so in order to make possible the *Rechtsstaat*—the state bound by the rule of law—the state must be able to bind itself to its own laws, a situation that has been referred to as “Jellinek’s Paradox.”<sup>167</sup> Jellinek did offer a theoretical justification for this “self-binding” or “auto-limitation” doctrine at the legal “level.” If the autonomous subject of Kantian moral philosophy could bind himself or herself to rules, so could the state; and since it was constitutive for the idea of a legal relationship

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<sup>165</sup> The attribution of sovereignty to the state, rather than to the monarch or to the people, was a typical move by which legal positivists during the Empire deflected the question of where sovereign power really lay. The debates, in which Jellinek participated, about whether to conceive the state as a legal person and its officers (notably the monarch) as “organs” of this person need not concern us here.

<sup>166</sup> Jellinek, *Allgemeine Staatslehre*, 475-77.

<sup>167</sup> Caldwell, *Popular Sovereignty*, 42. Properly speaking, according to Jellinek, sovereignty did not mean unlimited power but the power to be bound exclusively by one’s own will (*Allgemeine Staatslehre*, 481) for the reason expressed in the following sentences.

that it must always presuppose at least two “legal subjects” bearing certain rights, the state must accord its citizens such rights and mechanisms for their protection, which meant that the state would have to limit itself or abandon the notion of a legal order entirely.<sup>168</sup> But he clearly stressed that what really limited state power and helped establish a legal order based on the rule of law, as opposed to absolutism, patrimonial justice, or some other type of order, were the concrete historical circumstances that allowed for competing social and economic powers to check the state.<sup>169</sup> If the political scientist could supply the public lawyer with accurate *factual* data regarding the ways in which the state’s power was constrained to establish a legal order that accorded with the balance of conflicting interests, then the latter would be able to pursue his normative inquiries at the juristic “level” without fear of losing his objectivity.

Such was Jellinek’s theory. It clearly attempted to defend a broadly positivistic conception of the task of legal science while acknowledging and actively promoting the social scientific study of law, and recognizing the importance of social and economic change for correct legal analysis.<sup>170</sup> As a response to the demand for greater attention to social problems in the law which nonetheless protected legal reasoning from becoming the mere expression of personal opinions on those problems, it was a remarkably workable and persuasive position. Nonetheless, it was open to criticism. From one angle, it minimized the tensions between juristic analysis and social needs by assuming that the latter could be settled first and then taken as

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<sup>168</sup> For this argument, see Jellinek, *System*, 10; Keller, “Victor Ehrenberg und Georg Jellinek,” 56, and especially Christoph Schönberger, “Ein Liberaler zwischen Staatswille und Volkswille: Georg Jellinek und die Krise des staatsrechtlichen Positivismus um die Jahrhundertwende,” in Paulson and Schulte, eds., *Georg Jellinek: Beiträge*, 20-21, and the sources cited there (Jellinek’s earliest expression of this view dates to 1880).

<sup>169</sup> See the analysis in Caldwell, 42-43, and in Duncan Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt and Franz Neumann* (Oxford: Oxford University Press, 2003), 98-99. Jellinek was well aware that such circumstances, interests, and powers were constantly changing: see, e.g., *Allgemeine Staatslehre*, 257, and, especially, his last major work, *Verfassungsänderung und Verfassungswandlung* (Berlin: Häring, 1906).

<sup>170</sup> That Jellinek regarded such openness as essential is also suggested by his negative remarks on the effects of the constructivist-inspired Civil Code: he wrote to Josef Unger in 1908 of the “desolations” (*Verwüstungen*) that it had introduced into German jurisprudence, which, he observed “is doubtless in decline!” Jellinek to Unger, 11 June 1908, NL Jellinek 1136/41.

givens by jurists, whereas on the most contentious issues, a consensus was not likely in the offing, and the law itself would “take sides” in the meantime if only because it would continue to employ its traditional holdings until and unless they became invalidated.<sup>171</sup> Moreover, it is hardly implausible to assume that a change in social and political opinions that altered one basic legal principle might create contradictions within the legal order as a whole, by altering its place in the network of *other* basic principles, which could not be worked out by legal reasoning alone.

The plausibility of his position also relied on his assumption that the same object—“the state”—was the object of investigation of both the juristic and the social scientific methods. For the basic premises supplied to the *Normwissenschaft* of legal science by the *Kausalwissenschaft* of the social or political study of the state needed to be the same type of propositions, or they could not be legitimately transferred between the two types of sciences. Here Jellinek showed his debt to Gerber and legal positivism by conceiving of the state as a primordially “given” object studied by different perspectives, rather than as an object *created* by the particular method deployed by the scholar, in the neo-Kantian fashion of Jellinek’s friend Windelband.<sup>172</sup> But this procedure opened him to criticism from the man who would become the most consistent neo-Kantian positivist, Hans Kelsen, who reviewed Jellinek’s work in his massive habilitation book, *Hauptprobleme der Staatsrechtslehre*, in the year of the latter’s death. Kelsen argued that Jellinek’s attempt to explain the connection between the normative and factual levels violated his own injunction to separate Is and Ought. Jellinek’s mediation did not ultimately work, according to Kelsen, because the methods of *Normwissenschaft* and *Kausalwissenschaft* created *two*

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<sup>171</sup> A related criticism is that made by Stefan Koriath, who remarks that for Jellinek, “[t]he theory of the law of the state can merely track the success or failure of transformative strivings of political forces,” and must acknowledge irrational political *faits accomplis* without any normative theory of why it must do so: Koriath, “The Shattering of Methods in Late Wilhelmine Germany: Introduction,” in Arthur Jacobson and Bernhard Schlink, eds., *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000), 46.

<sup>172</sup> Breuer, “Fachmenschenfreundschaft,” 314-15; Hübinger, “Staatstheorie und Politik als Wissenschaft,” 147.

*different objects of study*, namely the state taken as a unified normative order, and the state taken as a concrete political and historical phenomenon. To refer to them by the same predicate created a confusion between the two objects that Jellinek then employed to suggest a connection.<sup>173</sup> This critique was to be extremely influential, for, as scholars of the more raucous debates in Weimar jurisprudence have observed, “By taking the positivism of the Empire to its extreme, Kelsen also forced those who rejected positivism and urged going beyond it to an extreme. They all believed in a one-sided state and in a one-sided way of viewing and treating it—albeit in a form very different from Kelsen’s.” Kelsen helped to ensure that Jellinek’s “two sides” were not reconnected.<sup>174</sup>

Finally, Jellinek’s theory meant that the problem of objectivity was moved back a step from the juristic to the social sciences. Social science was to supply facts for the jurists’ consumption, but as we saw above, Jellinek believed that social scientific researchers relied inevitably on purely subjective value-orientations to give them their direction. How, then, could the objective *social scientific* knowledge of the state be provided, which was necessary for understanding both its factual reality *and* the underpinnings of its normative reality as a legal order? This problem would seem to threaten both the juristic and the social scientific “sides,” both the normative science of law and the factual science of state.

Like most of his contemporaries, Jellinek believed on a personal level in the need for an ascetic practice of scholarly objectivity much as Weber did.<sup>175</sup> Radbruch observed that even

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<sup>173</sup> For Kelsen’s critique, see Koriath, “Shattering of Methods,” 47; Stirk, *Twentieth-Century German Political Thought*, 25; Stolleis, *Public Law*, 443. For a defense of Jellinek (who was indeed well aware of the constitutive effects of scholarly perspective, as we saw above), see Wapler, *Werte und das Recht*, 171-73, who points out it is not necessary to assume that there can be no single transcendental object behind the empirical objects created by the two methods, and that neither Windelband nor Rickert joined Kelsen in assuming this.

<sup>174</sup> Arthur Jacobson and Bernhard Schlink, “Introduction: Constitutional Crisis: The German and American Experience,” in *Weimar: A Jurisprudence of Crisis*, 16-17.

<sup>175</sup> Anter, “Modernität und Ambivalenz,” 42, calls attention to his “calvinistisch strenge[n] Wissenschaftsideal” and self-discipline bordering on asceticism, and points to various places where Jellinek rejected political passion in favor

Jellinek's interventions on topical political issues in the last decade of his life were written "with the skepticism of the theoretical-contemplative man,"<sup>176</sup> a trait which seems to have been with him from his youth, since he was willing to criticize his liberal compatriots in the feuilletons of the Vienna press for debasing "true, genuine science" by politicizing it for their own gain against the clerical adversaries they shared.<sup>177</sup> And he certainly rejected explicitly partisan scholarship, as is apparent from his report to Ludwig Felix from 1893 about a discussion in which the famous historian Theodor Mommsen had debated with him about the possibility of objectivity in scholarship—and the fact that he later *agreed* with Mommsen's opposition to what they both perceived as the establishment of a specifically Catholic chair of history at Strassburg for the son of a Catholic Center Party leader in the "Martin Spahn affair" of 1901.<sup>178</sup>

Nonetheless, for reasons suggested above, it was clear that a call for personal virtue would never be enough to secure objectivity for Jellinek. In practice, he insisted, positivists who had relied on ethical injunctions to exclude "political value-criteria" made them implicitly or explicitly all the time, and if anything the process was intensifying, threatening to make the science of state law merely a "handmaid" for party politics much as philosophy once was for theology.<sup>179</sup> The very idea of producing scientific knowledge without the presuppositions delivered by subjective value judgments was "impossible," for "absolute presuppositionlessness

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of calm scientific analysis from 1885 to his death ("To express political wishes here is not my office [*Amt*]," and so forth).

<sup>176</sup> Radbruch, untitled review essay in *Biographische Schriften*, 22.

<sup>177</sup> Jellinek, "Die deutsche Philosophie in Österreich," *ASR* I, 65-66.

<sup>178</sup> Jellinek to Ludwig Felix, 5 June 1893, in NL Jellinek 1136/43 (a letter reprinted inaccurately and with silent deletions in Camilla Jellinek, *Lebensbild*). On the Spahn case, see Jellinek to Ehrenberg, 29 December 1901 in *E/J Briefwechsel*, 419 and Paul Hensel to Jellinek, 20 December 1901, in NL Jellinek 1136/11, as well as Kempter, *Die Jellineks*, 334.

<sup>179</sup> Jellinek, "Kampf des alten mit dem neuen Recht," *ASR* I, 423.



in human things does not exist,” and the human subject conditioned the knowledge he or she produced just as the constitution of a mirror conditioned what it could reflect.<sup>180</sup>

Man is himself always the presupposition of his research, and this man is not thinkable as a *tabula rasa* which is to be first described by the researcher. Each individual can approach the material he is to study only in his capacity as the product of an unending series of cultural forces [*Kulturwirkungen*]. So it is, then, quite natural that the scholar of state law cannot be entirely without political opinions when he enters his area of knowledge. Who could address himself to the study of human institutions, according to any particular orientation, if he were not able to ascribe some values to them!<sup>181</sup>

These orientation-providing values were obtained simply by commitment or avowal. “For the final foundations of our research here, as everywhere, there is no doubt-free knowing, but only an avowal [*Bekennen*] is possible, and unity in commitment [*Bekenntheit*] is as little to be found here as in any other area. But random, arbitrary will in the choice of commitment by no means prevails in science.” For every scientific stance (*Richtung*) “which wants to pass critical muster can in the final analysis grow only from the soil of a firm [*festen*] and self-contained *Weltanschauung*.”<sup>182</sup> This meant, above all, a thoroughgoing and rational consistency within one’s value set. If one were to adopt a particular value-based preference, for instance that of the medieval conception of sovereignty as the preferred doctrine of state, one would then have to abjure all other modern developments that would conflict with this preference. If unable realistically to remove these developments, one must either abandon one’s value commitment or adopt the attitude of Don Quixote, who, Jellinek observed, at least maintained his nobility through a consistency of worldview and a denial of opportunism.<sup>183</sup>

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<sup>180</sup> Jellinek, *System*, 12.

<sup>181</sup> Jellinek, “Kampf,” 424-25.

<sup>182</sup> *Ibid.*, 425.

<sup>183</sup> *Ibid.*

Such worldviews might be more or less appropriate to their times, as this example was meant to show, and on a practical level, this fact helped the individual in deciding between them.<sup>184</sup> Nevertheless, he wrote, “in all the opposition of opinions, which is unavoidably connected with any activity of valuing, the possibilities for assessing the past from... a universal standpoint are limited.”<sup>185</sup> There was, after all, inevitably a plurality of ‘living’ worldviews at any given time, and even those which were not a ‘live option’ for many people were capable of resuscitation by quixotic individuals. Universal agreement in Jellinek’s pluralist world was not likely. Far from deploring this situation, however, Jellinek saw in it the very precondition for progress in knowledge. In his academic addresses during the year of his rectorship, Jellinek voiced approval of the plurality and competition of opinions and worldviews, and the danger of having unity in intellectual life at the cost of authoritarian imposition. “[A] great people can only regard the subjection of its whole intellectual life under central direction [*zentrale Leitung*] as a grievous national disaster,”<sup>186</sup> he observed, since it was awareness and acknowledgment of plurality that kept the researcher from “one-sidedness” and the restraint or limitation of knowledge.<sup>187</sup>

The Grand Duke of Baden, whom Jellinek so admired, had done his duchy a great service by his willingness to promote intellectual and academic freedom. The freedom to argue as one saw fit was not then, and never would be, free from threat. “Once,” Jellinek wrote, “one believed naively that popular freedom [*Volksfreiheit*] also meant intellectual freedom. Today we know that political parties that have their firm support in broad popular circles can become even

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<sup>184</sup> Sinzheimer, *Jüdische Klassiker*, 228, rightly points to Jellinek’s use of historical appropriateness and “world history as judge” to suggest which self-contained *Weltanschauungen* might be most appropriate, though he leaves the mistaken impression that Jellinek regarded the judgments of world history as more definitive than in fact he did.

<sup>185</sup> Jellinek, “Kampf,” 426.

<sup>186</sup> Jellinek, “Grossherzog Friedrich I. von Baden...Gedächtnisrede,” 385-86.

<sup>187</sup> Jellinek, *Allgemeine Staatslehre*, 74.

more dangerous to the freedom of research and teaching, as the governments are often dependent on the support of those parties.”<sup>188</sup> Doubtless his own experience with political interference in academic life in the 1880s had a bearing on his views. Much like Laband in his experience of anti-Semitic hindrances and concerns about right- and left-wing populism, Jellinek would have wholly endorsed the sentiments of a letter the former once wrote him, remarking that “I have always wished you a professorship in which, free from the hustle and bustle of parties [*Parteigetriebe*] and from political bickering, you can live solely in your scientific studies.”<sup>189</sup> It was above all federalism, decentralization, and competition among universities and among professors, which Jellinek saw as ensuring the progress of science, keeping it free of external political threats and the internal threat of a single opinion.<sup>190</sup> The comments he made to this effect in October 1907 at the opening of a museum in Frankfurt deserve to be quoted extensively. He found it especially admirable that the museum had been opened with the support and at the behest of private citizens, a deed that

enhances and supports in a peculiar way not only German science, but science as a whole. There is no human and national interest which so requires decentralization [*Dezentralisation*] as science, which can indeed be supported from the outside, but never created; which can only bloom in the greatest multiplicity of institutions and personalities—science, which must breathe the air of fullest freedom of intellect and research [*Wissenschaft, deren Lebensluft die vollste Freiheit des Geistes und des Forschens ist*]. Such freedom is protected, with us, by the wise self-limitation of the state, protected through the existence of a great number of independent members of our Empire all competing with each other in the wide domain of the fostering of culture. But even with the best intentions of the leading men, political streams may well up that threaten a flood against this freedom. Moreover, one-sided dominance of schools within the academies can lead to the exclusion of newly emerging directions and thereby to a

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<sup>188</sup> Jellinek, “Grossherzog Friedrich I. von Baden...Gedächtnisrede,” 381.

<sup>189</sup> Laband to Jellinek, 29 December 1892, in NL Jellinek, 1136/15.

<sup>190</sup> Jellinek, “Grossherzog Friedrich I. von Baden...Gedächtnisrede,” 386.

bending of the free mind. And therefore it is of the highest importance that free associations exist, which in their way promote multiplicity and safeguard and ensure [*gewährleisten*] intellectual freedom, out of which alone the bloom of science can rise.<sup>191</sup>

There could be no complete certainty in science because of the unavoidable presence of subjective value judgments. But Jellinek was convinced that through the mechanism of academic freedom and the competition of ideas, science could be driven forward. The value of his own works, he wrote in the preface to the *System der subjektiven öffentlichen Rechte*, “in no way...lay in their content of absolute truth, which is never to be stated with certainty, but much rather in...[their being suited to be] a driving moment [*Moment*] in the scientific process of knowledge [NB: *Erkenntnisprozesse*]. Not so much their lasting results as the measure of forward-striving power that they foster, assigns them their scientific place.”<sup>192</sup> It was the task of social scientists to attempt to provide a comprehensive view of the state—or by extension any other subject matter—for *their time*.<sup>193</sup> Jellinek, whose own worldview as a moderate liberal emphasized progress and the almost “religious” commitment to the individual personality and its moral growth,<sup>194</sup> ultimately hoped that properly channeled ideational conflicts would lead the history of science, like history in general, to be a genuine development rather than ‘one thing after another.’<sup>195</sup> To the degree that objectivity in social science was possible, Jellinek thought, one could not rely on moral injunctions alone, but only on the establishment of a framework of institutions and processes.

### III. Hermann Kantorowicz: Free Law and Value Relativism

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<sup>191</sup> Jellinek, “Ansprache des Prorektors in Frankfurt am Main bei der Eröffnung des Museums der Senckenbergischen Naturforschenden Gesellschaft,” 13 Oct. 1907, in *ASR* I, 360.

<sup>192</sup> Jellinek, *System*, vi.

<sup>193</sup> Jellinek, *Allgemeine Staatslehre*, xvi.

<sup>194</sup> See, e.g., Radbruch, untitled review essay in *Biographische Schriften*, 22, for this characterization.

<sup>195</sup> For remarks on his hopes for such conflicts leading to *moral* development in history, see “Kampf,” 427.

Jellinek and Hermann Kantorowicz were very dissimilar in personality and did not much like each other in their limited interactions, although their basically liberal worldviews overlapped to some degree. Both men shared an openness to introducing sociological considerations into the law—as well as a less uncommon interest in legal-historical studies—and both found inspiration in neo-Kantian epistemology and theory of science. They have been considered together before, albeit very briefly, as examples of the critique of imperial legal thought from two sides: of the legal system’s origin and legitimacy in one case, and of the application of law in cases where there was no clear precedent for easy subsumption under a given rule in the other.<sup>196</sup> It is the latter problem, and Kantorowicz’s attempt to solve it through his program of “Free Law” without falling into a purely emotive “*Gefühlsjurisprudenz*,” that will occupy us in the following section.

The picture of Kantorowicz’s methodological ideas drawn here will be somewhat less complete than that of Jellinek’s, for several reasons. First, unlike Jellinek, Kantorowicz was only beginning his career in the decade before World War I, which forms the temporal boundary for this dissertation, and his later writings are not considered. Neither Kantorowicz nor his contemporary and friend Gustav Radbruch was able to produce a persuasive methodological position on objectivity in these years, to supplement or rival the schemas of Weber and Jellinek. But they both shared similar views on the nature of science, values, and value judgments in social science—themes to which Radbruch devoted substantially more attention than Kantorowicz, justifying his treatment in a separate chapter. Kantorowicz’s ideas on values and value-freedom were deeply marked by his reception of the thought of Georg Simmel, Heinrich Rickert, and Max Weber, and thus in *this* area his thought was less noteworthy for its originality

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<sup>196</sup> Peter Caldwell, *Popular Sovereignty*, 42-44, considers them in this fashion; both appear, again briefly, in Arnold Brecht’s path-breaking account of the origins of “scientific value relativism” in *Political Theory*, 220-21, 232-33.

than for the promptness and thoroughness with which he embraced value relativism. In later life, and particularly in exile after 1933, Kantorowicz did yeoman work in spreading the Weberian vision and in producing a thoughtful critique of American legal realism, a school that might have seemed for all intents and purposes to be a continuation of his own early ideas.<sup>197</sup> But what he wrote on methodological issues during the pre-war period principally concentrated on combatting constructivism and on defending himself from the attacks on his youthful polemic, *Der Kampf um die Rechtswissenschaft*. Finally, there are fewer biographical sources available for Kantorowicz, who did not write autobiographical reflections or benefit from a family biography,<sup>198</sup> although he did leave behind correspondence allowing us to reconstruct some of his attitudes.

Nevertheless, Kantorowicz is of interest not just as an early adopter of value-freedom, but because he embraced the doctrine despite its lack of immediately obvious alignment with the primary goals of the Free Law movement to which he belonged—a step other key members such as Eugen Ehrlich and Ernst Fuchs did not take. Moreover, he provides yet another instance of the variety of paths to value-freedom, for unlike most of the other early adopters, the young Kantorowicz was not persuaded of the logical impossibility of deriving *Sollen* from *Sein* until well after he had embraced *Werturteilsfreiheit*.

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<sup>197</sup> The best assessment of this relationship is Vivian Grosswald Curran, “Rethinking Hermann Kantorowicz: Free Law, American Legal Realism, and the Legacy of Anti-Formalism,” in Annelise Riles, ed., *Rethinking the Masters of Comparative Law* (Oxford: Hart, 2001), 66-91, which is also devoted to an effective rebuttal of the occasional claim that the Free Law movement helped clear the theoretical path for Nazi illegality.

<sup>198</sup> The recent article by Kantorowicz’s son from his second marriage, Frank Carter (d. 2010), “Gustav Radbruch and Hermann Kantorowicz: Two Friends and a Book – Reflections on Gnaeus Flavius’ *Der Kampf um die Rechtswissenschaft* (1906),” *German Law Journal* 7:7 (July 2006), 657-700, makes sparing use of the author’s own recollections and refers to the existence of an autobiographical manuscript by Kantorowicz’s second wife, but the latter is not publicly accessible.

Kantorowicz was born in late 1877 in the Prussian city of Posen, now in Poland, and he grew up there until 1884, when his family moved to Berlin.<sup>199</sup> His father, Wilhelm Kantorowicz, was a prosperous distiller and director of the Ostdeutschen Spritfabrik, who was able to ensure that Hermann received a first-rate education and later provided for him to live and conduct research in Italy for several years before receiving his first academic job. Although he had only briefly attended a Gymnasium without graduating, Wilhelm was an intellectually engaged businessman who wrote several books on aesthetics, politics, and economic policy. A convinced liberal and internationalist, he was concerned about the maintenance of market competition in the face of the contemporary tendency toward cartelization, and he wrote against continuing the war after 1914. Although the younger Kantorowicz's biographer exaggerates in saying that Hermann's political stances and aesthetic interests are "unthinkable" without Wilhelm's example, the son certainly came to share "his political engagement, his pacifism, his economic liberalism, [and] his...radical objectivity" especially in the matter of assessing Germany's "war guilt."<sup>200</sup>

The family was confessionally Jewish but Kantorowicz does not seem to have had a religious upbringing. Like Jellinek, he was indifferent to his family's heritage and took the step of becoming "without confession" and subsequently converting to Lutheranism in 1905, although unlike Jellinek he did so at a young age and without concerns about alienating his

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<sup>199</sup> The brief biography of Kantorowicz by Karlheinz Muscheler, *Hermann Ulrich Kantorowicz: Eine Biographie* (Berlin: Duncker & Humblot, 1984), is the source of most of the biographical information supplied here. For other biographical sources (mostly encyclopedia entries), see the extensive list by David Ibbetson in his article "Hermann Kantorowicz (1877-1940) and Walter Ullmann (1910-1983)," in Jack Beatson and Reinhard Zimmermann, eds., *Jurists Uprooted* (Oxford: Oxford University Press, 2004), note 2. There is no basis for the middle name "Ulrich"; Kantorowicz occasionally added an invented middle initial "U." to distinguish himself from another Hermann Kantorowicz, but did not have a given middle name: Carter, "Gustav Radbruch and Hermann Kantorowicz," 657, n.2.

<sup>200</sup> Muscheler, *Kantorowicz*, 12. It may be noted in passing that Hermann was not related to the other famous medievalist Ernst Kantorowicz, although both were born in Posen and both had connections with the Stefan George circle—considerably more intimate in the latter's case than in Hermann's. For more on this see Muscheler, 10, n.3.

family.<sup>201</sup> In a letter to Radbruch, which is reprinted at length by his biographer, Kantorowicz discussed what he remarkably referred to as his own “anti-Semitism,” albeit not, he said, “in the stupid sense.” He wrote that conversion was “the only practicable way for me to feel myself to be a German, and to make it possible for my children to be absorbed into the German nation [*Deutschentum*]. I am not a Jew, because I do not feel myself to be such.”<sup>202</sup> The step was not taken just to help him to clear the path of anti-Semitic obstacles to an academic career, but was for him, as he later suggested in an obituary of his fellow medievalist Max Conrat (Cohn), also a way of identifying with Germany and the “German ideal of science” [*deutsches Wissenschaftsideal*] which had its roots, or so he said, in Protestantism.<sup>203</sup>

Educated principally in Berlin at the Royal Luisen-Gymnasium and then at the capital’s university, Kantorowicz’s pattern of study was leisurely.<sup>204</sup> Focusing principally on law, philosophy, and political economy, he began his doctoral studies in 1896 and received his “Promotion” through an oral examination in Roman private and German criminal law at Heidelberg in 1900, apparently without having to submit a written dissertation.<sup>205</sup> With a year’s military service in a cavalry regiment in 1901-1902 as the only partial interruption, during which he attended classes in Munich, he continued to study criminal law in Berlin with the distinguished criminalist Franz von Liszt until 1903, and medieval legal history in Florence, Italy

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<sup>201</sup> Ibid., 12-14. Carter, “Gustav Radbruch and Hermann Kantorowicz,” 660, suggests that the family was not at all religious and that even Kantorowicz’s parents “preferred to think of themselves as German,” drawing thereby a dichotomy between German and Jewish identities that affected Hermann’s attitudes as well.

<sup>202</sup> Kantorowicz to Radbruch, 14 November 1905, in Nachlass Hermann Kantorowicz, Universitätsarchiv, Albert-Ludwigs-Universität Freiburg, C36 IV B 19. Hereafter cited as NL Kantorowicz. The parts of this letter relevant to Kantorowicz’s views on Judaism are also reproduced by Muscheler, *Kantorowicz*, 13-14. Kantorowicz’s correspondence has never been published. Typescripts of his letters to Radbruch were made by his second wife and are available both at Freiburg (C36 IV B 20), and at Heidelberg (NL Radbruch, III. F. 601); although they are highly useful and generally accurate, I have checked them against the originals and cite only from the latter, since numerous small divergences were introduced into the transcripts.

<sup>203</sup> Muscheler, *Kantorowicz*, 14.

<sup>204</sup> Ibid., 17, provides the basic data. Kantorowicz also spent one semester at Geneva in 1897.

<sup>205</sup> Carter, “Gustav Radbruch and Hermann Kantorowicz,” 661. There is no evidence of a submitted dissertation, so Carter is presumably correct that Kantorowicz achieved this wondrous feat.



as a private scholar until 1907. Eventually rejecting the idea of gaining a second doctorate in philosophy, he developed a tripartite expertise in criminal law, legal philosophy, and legal history. Although it was in the third of these areas that he was to gain his highest reputation,<sup>206</sup> especially in the Anglo-Saxon world, he first made a name for himself with the publication of the controversial 1906 tract on legal method, *Der Kampf um die Rechtswissenschaft*, to which we will return. His attempt to habilitate at Heidelberg in early 1906 was unsuccessful, owing to a combination of anti-Semitism, concern about the apparent radicalism of the *Kampf* polemic, and Kantorowicz's own alienation of some of the Heidelberg faculty during his visit to interview for a *Privatdozent* position.<sup>207</sup> Kantorowicz was more successful at Freiburg the following year, gaining Richard Schmidt's support to habilitate there and to teach criminal law and legal history, a remit widened to include legal philosophy in early 1908 as Kantorowicz settled in.<sup>208</sup> Nevertheless, he had great difficulties moving forward in his professional career. Made a "titular" but unsalaried professor in 1913, he had to wait until 1923—interrupted by war service in a military hospital and as a postal censor—for an associate professorship in "juridical auxiliary sciences" and until late 1928 for an appointment as full professor at Kiel.<sup>209</sup> Dismissed by the Nazis in 1933 while he was on leave in Florence, Kantorowicz moved first to England, then to New York, where he taught at the "University in Exile" at the New School for Social Research in

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<sup>206</sup> Gustav Radbruch, "Hermann Kantorowicz †", *Schweizerische Zeitschrift für Strafrecht* 60 Jg. (1946), 262-76, reprinted in Radbruch, *Biographische Schriften*, 75-88, here 79-82. Radbruch points out that this historical work extends beyond medieval history to various essays on nineteenth-century jurisprudence.

<sup>207</sup> Kantorowicz defended himself against charges of arrogance in this connection in a letter to Radbruch of 5 March 1906: NL Kantorowicz IV B 19. Among the professors whom he apparently displeased was Jellinek, who certainly could not be accused of anti-Semitic prejudice, although it is possible that he held back to avoid the appearance of supporting Kantorowicz *because* he was Jewish (this was Radbruch's theory): see Kempter, *Die Jellineks*, 301. Kantorowicz would cite Jellinek respectfully thereafter, but privately described him to Radbruch as "ein schwarzer Intrigant," and refused to work with him on a journal they were planning: Kantorowicz to Radbruch, 9 May and 4 June 1907, in NL Kantorowicz IV B 19.

<sup>208</sup> Muscheler, *Kantorowicz*, 32-33.

<sup>209</sup> *Ibid.*, 98.

1933-34. He returned to England in 1934, where he taught at LSE, Cambridge, and Oxford until his early death in 1940.<sup>210</sup>

Most of the obstacles to Kantorowicz's career during the Weimar era resulted from his willingness to stand up for his political convictions, and this has led some scholars to claim him as another casualty of the anti-socialist attitudes prevalent in the universities during the early twentieth century. Recent English-language accounts of Kantorowicz's politics place great emphasis on his attitudes in 1903, when he briefly took the unusual step of joining the SPD, and although he soon had second thoughts and resigned his membership the same year, these accounts make use of a phrase in a 1903 letter to Radbruch to claim that he had a lifelong "platonic love of Socialism."<sup>211</sup> In fact, as better informed German writers are aware, apart from this strong but brief enthusiasm in 1902-1903, Kantorowicz was much closer to the left liberals with his adamant support for democracy, free trade, and anti-imperialism.<sup>212</sup> He was in fact quite critical of social democracy. The same letter to Radbruch remarked that "a respectable person can no longer remain today in a party dominated from below by fanaticism and from above by cowardice."<sup>213</sup> As Radbruch became increasingly inclined toward socialism after 1912, Kantorowicz often challenged him to remember that a consistent relativist must be able to see and tolerate multiple perspectives: "By the way, you, as a relativist... *must* also learn to look at things from the opposite perspective. This inclination to see everything from below and to the left [*alles von unten links zu sehen*] makes the understanding of an entity [*Gebilde*] like the

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<sup>210</sup> For Kantorowicz's final years, see Muscheler, *Kantorowicz*, Chs. 10-11, and Ibbetson, "Hermann Kantorowicz and Walter Ullmann," 277-82.

<sup>211</sup> See, e.g., Curran, "Rethinking Hermann Kantorowicz," 67; Carter, "Gustav Radbruch and Hermann Kantorowicz," 661; Margaret Crosby, *The Making of a German Constitution: A Slow Revolution* (New York: Berg, 2008), 59.

<sup>212</sup> Monika Frommel, "Hermann Ulrich Kantorowicz (1877-1940), Ein Streitbarer Relativist," in Thomas Blanke, ed., *Streitbare Juristen* (Baden-Baden: Nomos, 1988), 249 (although even she uses the 1903 comment to Radbruch to suggest, without evidence, that Kantorowicz's "platonic love" was an enduring one); Muscheler, *Kantorowicz*, chapters 5-9, provides the only adequate account of Kantorowicz's politics.

<sup>213</sup> Kantorowicz to Radbruch, undated letter (presumed to be early 1904), NL Kantorowicz IV B 19.

Prussian army and state impossible.’’<sup>214</sup> Nonetheless, Kantorowicz himself had no liking for the authoritarian institutions of the *Kaiserreich*. Like most left liberals, he was willing to work with the moderate socialists at least from 1917 onwards, even writing to Eduard Bernstein to suggest political tactics for cooperation in the Reichstag.<sup>215</sup> And he was certainly unpopular with the nationalist right because of his courage in publishing a book arguing that Germany should share the blame with Austria-Hungary for the precipitation of the Great War.<sup>216</sup> Although his extensive Weimar political activities and commitments to the liberal German Democratic Party and to pacifism fall outside the scope of this dissertation, they represent a continuous development from his less active pre-war liberalism rather than a substantive shift.<sup>217</sup>

Despite a certain political distance as the years passed, Kantorowicz’s closest intellectual companion and discussion partner remained Radbruch, whom he met at Liszt’s seminar in Berlin in 1903. Their friendship lasted until Kantorowicz’s death and involved intensive cooperation between 1903 and 1908 in particular, on various projects including the writing and editing of Kantorowicz’s *Kampf um die Rechtswissenschaft*. Kantorowicz certainly read Radbruch’s work very carefully as well, beginning with his dissertation and habilitation on legal philosophical questions of causality and action, and offered critical commentary.<sup>218</sup> Nonetheless, an assessment

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<sup>214</sup> Kantorowicz to Radbruch, 12 April 1917, in NL Kantorowicz IV B 19. In a letter of 30 October 1933 which Kantorowicz wrote in English to Lydia Radbruch during his stay at the New School in New York, he remarked of his fellow émigré instructors that “they are most of them socialists and you know I never liked socialists and like them less than ever today.” Quoted in Muscheler, *Kantorowicz*, 111 n.277.

<sup>215</sup> Kantorowicz to Bernstein, 6 May 1917, in NL Kantorowicz IV B 19. This interesting letter reminds Bernstein of the time when they used to discuss politics in the “Kaffeehaus des Westens” in Berlin around 1902-1903, remarking that “I stood near to socialism at that time and have since distanced myself from it,” although he sees common interests now with the SPD regarding the constitutionalization and parliamentarization of Germany.

<sup>216</sup> Muscheler, *Kantorowicz*, 65-68, discusses the reaction to this book at Freiburg, which descended into anti-Semitism and student protests.

<sup>217</sup> He did certainly believe that World War I occasioned a greater likelihood for his favored political goals of greater democratization and commitment to peace and internationalism, however: see Kantorowicz to Radbruch, 16 August 1916, and Kantorowicz to a correspondent named only as Eugen, 31 July 1917, in NL Kantorowicz IV B 19.

<sup>218</sup> See, for instance, the first letter from Kantorowicz to Radbruch, undated but from September 1903, and the undated letter from April 1904, in NL Kantorowicz IV B 19. We will examine Radbruch’s habilitation book on the concept of action in the following chapter.

of their respective views on methodological questions reveals that they continued to differ on important points, and that they shared a set of common interests rather than common doctrines; and as Kantorowicz moved closer to Radbruch's standpoint later on, it was owing to the former's acceptance of neo-Kantian "cultural-scientific" thinking in its Rickertian and Weberian forms.<sup>219</sup> Kantorowicz's biographer Karlheinz Muscheler is correct to observe that their friendship owed more to a commitment to mutual and open critique, and to a recognition by both parties that they possessed complementary rather than similar character traits, than it did to agreement on arguments for the advancement of a relativistic, sociological conception of law.<sup>220</sup>

If Radbruch cannot really be said to have helped to determine Kantorowicz's thinking on methodological questions beyond providing him with a responsive sounding board, it remains at least to indicate which elements of the latter's background prepared him to write the several long articles and addresses of 1906-1914 in which he first embraced value-freedom. Kantorowicz's formation as a *legal* thinker was shaped primarily by figures within the broad stream of sociological or "interests"-based jurisprudence that had its source in Jhering. Jhering himself held "the place of honor in the heart of the German jurist" and in Kantorowicz's overview of legal theories since the middle ages, where he was portrayed as the culmination of the neo-scholasticism of constructivist jurisprudence and the initiator of the teleological, *Zweck*-oriented conception of law, which had its "full and systematic unfolding" in the Free Law movement.<sup>221</sup> The discussion group in Berlin that Kantorowicz started with Radbruch and two or three other law students in 1903 also read the works of other jurists who had pressed for greater attention to

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<sup>219</sup> Frank Saliger, "Radbruch und Kantorowicz," *Archiv für Rechts- und Sozialphilosophie* 93:2 (April 2007), 236-51, especially sections III. and IV.

<sup>220</sup> Muscheler, *Kantorowicz*, 27; see also Saliger, 237-40; Carter, 661.

<sup>221</sup> Kantorowicz, "Die Epochen der Rechtswissenschaft," *Die Tat* 6 (1914), 345-61, here 360-61. The essay is also reprinted in Kantorowicz, *Rechtshistorische Schriften*, ed. Helmut Coing and Gerhard Immel (Karlsruhe: Müller, 1970).

the balancing of social and economic interests (at the expense of logical construction) as the task of the judge.<sup>222</sup> Among them was Eugen Ehrlich, a founder of legal sociology who coined the term “free legal science” [*freie Rechtswissenschaft*] in a lecture of 1903, which the group read early the following year.<sup>223</sup> Ehrlich argued here that constructivist jurisprudence was no likelier to generate legal certainty, and thus predictability, in difficult cases than was a judge free to decide the case as he saw fit, a position that Kantorowicz came to make the center of *Kampf um die Rechtswissenschaft*.<sup>224</sup> However, Ehrlich later began to represent a thoroughgoing sociological reductionism, arguing “that law in the ordinary sense, ‘lawyers’ law,’ exists side by side with other factors in society which may heavily influence or even in practice override it; such factors, inasmuch as they are recognized and influence behavior, are equally law and should be studied by lawyers.”<sup>225</sup> Kantorowicz did not follow him so far, suggesting to Radbruch that they avoid including Ehrlich, “who is becoming ever more absurd,” in a special issue of the journal *Die Tat* devoted to the “new” jurisprudence.<sup>226</sup> Neither Jhering nor Ehrlich nor any of the other figures who contributed to Kantorowicz’s development of “Free Law” wrote on or accepted the core tenets of the value-freedom complex, although both of them held essentially relativistic views on the validity of the social purposes that they sought to make central to law-finding.<sup>227</sup>

Kantorowicz’s views on methodological questions, and particularly in the area of values and value-freedom, also owed much to non-juridical *philosophical* sources. During his student

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<sup>222</sup> The names of like-minded jurists listed in Gnaeus Flavius [Hermann Kantorowicz], *Kampf um die Rechtswissenschaft* (Heidelberg: Winter, 1906), 8 and 50, provide an indication of the authors the group read. (The little book was published pseudonymously but Kantorowicz’s identity quickly determined.)

<sup>223</sup> Kantorowicz to Radbruch, undated letter of early 1904 in NL Kantorowicz, IV B 19.

<sup>224</sup> Sebastian Silberg, *Hermann Kantorowicz und die Freirechtsbewegung* (Berlin: Logos, 2004), 6-8, 22-24 provides a brief background on Ehrlich and on similarities to Kantorowicz’s thinking.

<sup>225</sup> J.M. Kelly, *A History of Western Legal Theory* (Oxford: Oxford University Press, 1992), 362.

<sup>226</sup> Kantorowicz to Radbruch, 28 December 1913, in NL Kantorowicz IV B 19.

<sup>227</sup> Silberg, *Hermann Kantorowicz*, 22, rightly points this out in the case of Jhering.

days, Kantorowicz had been greatly impressed by a young Russian-German itinerant scholar named Gregorius Itelson, who introduced him to philosophical logic in a trial by fire, ruthlessly criticizing his every opinion and “making a wholly new person out of me,” and instilling in him the desire to gain a strong foundation in formal logic.<sup>228</sup> Muscheler observes that “Kantorowicz’s preference for categorical determinations and classifications, for definitions and distinctions, for logical argumentation and refutation, as well as his delight in sharp antitheses” across his philosophical and historical writings, very likely gained their “early foundation” here.<sup>229</sup> Kantorowicz would make full use of his training in formal logic in the devastating critique of the legal philosopher Rudolf Stammler which he published in 1908-1909, in which his basic nominalism also found expression. Here he employed a distinction between “real” and “nominal” definitions to show that Stammler often failed to move beyond circular arguments and playing with words in his “solutions” to the problems of a formally correct and universal natural law with changing substantive content.<sup>230</sup> An attempt to avoid any sort of implicit metaphysical assumptions about the essence [*Wesen*] of anything defined, this distinction called for an explicit, stipulated definition, fulfilling criteria including clarity and consistency at the outset of any scientific investigation so that investigators could agree on what question they were asking and would count as evidence in answer to it.<sup>231</sup> Kantorowicz’s basic philosophical attitudes clearly

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<sup>228</sup> Kantorowicz to his parents, 11 July 1898, in NL Kantorowicz, IV B 19.

<sup>229</sup> Muscheler, *Kantorowicz*, 19-20.

<sup>230</sup> Kantorowicz, *Zur Lehre vom richtigen Recht* (Berlin: Rothschild, 1909), 15-17. This essay was first published in a slightly shorter version in *Archiv für Rechts- und Sozialphilosophie* 2 (1908).

<sup>231</sup> “Nominal definition” essentially signaled what the author understood by a term, and was merely stipulated at the outset rather than established; while a “real definition” was the answer to a conceptually-driven research question, which might be true or false. No science was possible without nominal definitions because no proof could then be offered one way or another as to the correctness of the “real definition” or scientific proposition being debated. Kantorowicz’s principal example is Stammler’s criteria for what constitutes “right law” [*richtiges Recht*]: that right law is “that law which corresponds to the social ideal” of freely willing persons. Kantorowicz points out that Stammler often uses this stipulated definition as a hidden premise in arguments designed to show that it is also an empirically founded proposition about reality, making his efforts tautological. *Ibid.*, 18-19. See also Karlheinz Muscheler, *Relativismus und Freirecht: Ein Versuch über Hermann Kantorowicz* (Heidelberg: Müller, 1984), 1-9.

put him in line with the pattern of nominalism we have identified in other advocates of value-freedom, as well as with the associated voluntarism, as we will see.

Kantorowicz also drew on neo-Kantian philosophy, especially in his thinking about value-freedom. Here the early Kantorowicz was close to Georg Simmel, with whom he was personally associated, rather than to the southwest German school.<sup>232</sup> Kantorowicz's correspondence leaves no doubt that he and Simmel saw one another regularly in Berlin beginning no later than 1901. Not only were they socially acquainted—Simmel gave Kantorowicz introductions to the Stefan George circle in Munich in 1901, and Kantorowicz reported that they had grown to be “very close” friends during a vacation in the Austrian Tirol a few years later—but they read and commented on each other's work.<sup>233</sup> Simmel asked the much younger man to recommend literature on the legal philosophy of Rudolf Stammler, and Kantorowicz was clearly proud to report “that Simmel sets [*Kampf um die Rechtswissenschaft*] very high, and says he cannot conceive how one could contest such plausible things at all.”<sup>234</sup> Kantorowicz received not only “great refreshment [*Erquickung*]” from “conversations with good, dear Simmel,” but the basis for his early psychologistic conception of the “Ought,” and of ethical and legal norms, as pure will.<sup>235</sup>

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<sup>232</sup> The first to argue for the greater affinity which the early Kantorowicz felt with Simmel is again Muscheler, *Relativismus und Freirecht*, 41-43; more recent work on Kantorowicz has ignored the similarities with Simmel's position even where it recognizes his early psychological monism, e.g., Silberg, *Hermann Kantorowicz und die Freirechtsbewegung*, 80.

<sup>233</sup> Kantorowicz to his parents, 1 October 1901, and Kantorowicz to Radbruch, 14 November 1905 and 19 June 1906, in NL Kantorowicz IV B 19.

<sup>234</sup> Kantorowicz to Radbruch, 12 July 1906, in *ibid.*; at the same time, Simmel, who knew whereof he spoke, told Kantorowicz that “Liszt and he had wondered in common ‘how so intelligent a person as I [Kantorowicz] could publish such a dangerous book immediately before habilitation.’ It was idiocy [*eine Saudummheit*].”

<sup>235</sup> Kantorowicz to Radbruch, 20 January 1907, in *ibid.*; Kantorowicz, “Probleme der Strafrechtsvergleichung,” *Monatsschrift für Kriminalpsychologie und Strafrechtsreform* 4 (1907-08), 65-112, here 80 (see also the discussion below). When Kantorowicz and Radbruch were hoping to start a legal philosophy journal, the former also wrote that he hoped to persuade Simmel “to become our special legal philosopher [*unser spezial R.Philosoph*]”: letter of 18 July 1906.

Kantorowicz encountered southwest German neo-Kantianism somewhat later, largely through Radbruch's letters and in the person of Emil Lask when the latter was studying law in Berlin in 1904.<sup>236</sup> He initially rejected Baden value theory and its sharp separation between Is and Ought. However, sometime after he had begun teaching at Freiburg in 1908, he came to accept and work with a version of Rickert's methodology of cultural science, eventually melding Simmel's quasi-neo-Kantian perspective to the Baden approach and referring to "the Windelbandian-Rickertian-Simmelian philosophy of culture and history."<sup>237</sup> While still settling in to his new position and looking for like-minded colleagues on the faculty, he wrote that he "had hopes for Rickert," which must have been fulfilled at least to a degree, for the latter's work became a continual point of reference for Kantorowicz in methodological statements.<sup>238</sup> In his lectures on legal philosophy in the years just before World War I, for instance, he used the notion of " 'value-relevant' [*wertbeziehende* ] science in Rickert's sense" to distinguish between legal sociology and juridical dogmatics.<sup>239</sup> Radbruch later confirmed this shift in Kantorowicz's thinking from his early "empiricist 'psychological-historical-realistic' formulation" of legal philosophy to "another, value-theoretical [formulation] under the influence of H. Rickert and Max Weber."<sup>240</sup> And indeed, it was probably Weber with whom Kantorowicz had most in common, coupling value theory with relativism as both men did. Kantorowicz studied Weber's

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<sup>236</sup> Kantorowicz and Lask were introduced by Simmel (see the same undated letter of early 1904 cited above); Kantorowicz wrote Radbruch on 30 October 1904 to report that he thought "Lask would be very stimulating for you [*Sie werden durch Lask viel Anregung finden*]," which indeed would be the case.

<sup>237</sup> Kantorowicz, *Zur Lehre vom richtigen Recht*, 13.

<sup>238</sup> Kantorowicz to Radbruch, 17 May 1908, in NL Kantorowicz IV B 19. See, in published works, e.g. *Zur Lehre vom richtigen Recht*, 23; and Kantorowicz, "Rechtswissenschaft und Soziologie," in *Verhandlungen des Ersten Deutschen Soziologentages vom 19.-22. Oktober 1910* (Tübingen: Mohr Siebeck, 1911), 275-309, here 295, where he remarks that legal sociology can be founded "only on the ground of the Rickertian theory of science" and depicts his task as exploring the "fundamental meaning" of this theory for areas (like the law) that Rickert had only briefly discussed.

<sup>239</sup> Lecture notes, labeled "Materialien zu: Rechtsphilosophie," NL Kantorowicz II A 6, Folder 7, p. 62 under "Rechtssoziologie."

<sup>240</sup> Radbruch, "Hermann Kantorowicz †," 77-78.



“Objectivity” essay in the summer of 1906,<sup>241</sup> cited his work regularly, and remarked in a review of Marianne Weber’s volume of her husband’s collected writings on “*Wissenschaftslehre*” that Weber had indeed been a philosopher despite his modesty about the claims of his methodological papers. “His investigations on the nature of value judgments, on ideal-typical concepts, on the structure of laws, and his logically consistent exclusion of all considerations of ‘rightness’ [*Richtigkeit*] from concept formation—which he handled exclusively according to their appropriateness for the purpose at hand [*Zweckmässigkeit*]—belong to the most significant enrichments of recent German theory of science.”<sup>242</sup> Finally, now persuaded by the Baden neo-Kantian style of thought, he returned to Lask’s work on legal philosophy. “I have read his *Philosophy of Law* again and this time received a really significant impression; for example, what he says on natural law is the best that’s been said up until now,” he wrote in 1910, adding that he would like to develop Lask’s thoughts on the problems of legal history.<sup>243</sup>

Let us now turn from Kantorowicz’s intellectual influences to his thoughts on values, value-freedom, and legal methodology. Following an early attempt at delineating objectively valid aesthetic values, which he soon rejected, Kantorowicz was not shy about upholding a vigorous value relativism.<sup>244</sup> The factual statements of the natural sciences, he thought, would always be recognized as necessarily true by all rational people. But “the possibility of this necessity does not exist in the realm of values. No one can be forced to grant a particular value to a particular object, to let it provoke a particular feeling. The basis for the difference [between agreement on natural scientific facts and disagreement on values] lies in the fact of individuality.

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<sup>241</sup> Kantorowicz to Radbruch, 5 July 1906 [misdated in typescript as 3 July], in NL Kantorowicz IV B 19.

<sup>242</sup> Kantorowicz, “Max Weber,” in Kantorowicz, *Rechtswissenschaft und Soziologie: Ausgewählte Schriften zur Wissenschaftslehre*, ed. Thomas Würtenberger (Karlsruhe: C.F. Müller, 1962), 169. Originally in *Logos*, Jahrgang XI, 1922/23, 256ff. It is worth observing that this review from the early Weimar period was not uncritical of Weber.

<sup>243</sup> Kantorowicz to Radbruch, 13 January 1910, in NL Kantorowicz IV B 19.

<sup>244</sup> On this attempt, in a little book on Stefan George’s poetry written in 1902, see Muscheler, *Relativismus und Freirecht*, 30–32.

As knowing beings [*Wesen*] we possess no individuality, not the least, as far as logic and mathematics reach, and as far as sense perception reaches,” with certain “pathological” exceptions. “As feeling and willing and therefore *valuing* beings, however, we possess individuality, indeed as far different [from others’ individuality] as our interests and our characters are different. I claim, then, that there is indeed an objective correctness in the realm of knowledge, but that there is and there can be nothing like it in the realm of feeling, of obligation [*Sollen*: ‘Ought’] and willing—that there is truth as such, but values only for me, for you, for us, for historically given individuals or collective personalities.”<sup>245</sup> The most basic values would always be in conflict; Kantorowicz rejected any possibility that human beings could ever attain “unity” in their goals and purposes, noting that even geometry has dozens of axioms, while the even more “incalculable abundance” of different value positions meant that a single, universal system of values would remain impossible.<sup>246</sup>

Kantorowicz’s value relativism was integral to his views on legal methodology. As we have indicated, he initially made his name—for better or worse—through the publication of a pseudonymous tract, whose authorship was soon revealed, criticizing legal constructivism and promoting “Free Law.” *Der Kampf um die Rechtswissenschaft* was designed to be provocative; during its composition he remarked that it was a “*manifesto*” that “counts upon agitating the feelings. It’s turned out enormously radical.”<sup>247</sup> It was perhaps more radical for its tone than for its ideas, for Kantorowicz did not claim any great novelty for most of his arguments, seeing *Kampf* rather as a means of unifying and naming an already existing movement.<sup>248</sup> Essentially, it aimed to falsify the claim made by constructivists that the legal order—that is, the constitution

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<sup>245</sup> Kantorowicz, *Zur Lehre vom richtigen Recht*, 26-27.

<sup>246</sup> *Ibid.*, 21-22; *Probleme der Strafrechtsvergleichung*, 98.

<sup>247</sup> Kantorowicz to Radbruch, 4 December 1905, in NL Kantorowicz IV B 19.

<sup>248</sup> Kantorowicz, *Kampf*, 6.

and the *statutes and customary law* produced or acknowledged in accordance with it—was a gapless fabric, and that judges could decide any given case on the basis of legal logic and knowledge of the statutes alone. It was motivated by a desire to gain greater sensitivity to the social effects and purposes of law than allowed by the constructivist account. As Kantorowicz later elaborated, what he was fighting was “a jurisprudence that engages in unsubstantiated conceptual constructions [*ins Blaue hinein konstruiert*] without contemplation of the consequences, and then employs the legal concepts now available from the decision of a legal question without regard to the suitability [*Brauchbarkeit*] of the results.”<sup>249</sup>

In place of constructivism, Kantorowicz set the notions of “free law,” “free legal science,” and “free law-finding.” What these terms meant in practice was not always entirely clear; the Free Law movement was not known for a sharply defined positive program,<sup>250</sup> and Kantorowicz later backed away from some of his sharper formulations, as we will see. Initially, he defined free law as law found “independently of state power”; natural law was a form of free law, although mistaken in its metaphysical claims to universality, as were such sources as legal history, drafts for law codes, and judicial writings *de lege ferenda*—on what the law should be.<sup>251</sup> Such writings were not recognized as state law yet, but the state’s positive laws depended on and grew out of them.<sup>252</sup> Kantorowicz argued that such law should be deployed in judicial decisions as needed, leaving the actual status and grounds for validity of these sources somewhat uncertain. But there was no doubt that *Kampf* promoted a view of at least *some* judicial decisions as matters simply of “will” and the imposition of purely subjective values in a

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<sup>249</sup> Kantorowicz, “Methodenreform und Justizreform,” *Deutsche Richterzeitung*, No. 11/1911, reprinted in Andreas Gängel and Karl Mollnau, eds., *Gesetzesbindung und Richterfreiheit: Texte zur Methodendebatte 1900-1914* (Freiburg: Haufe, 1992), 263-74, here 266.

<sup>250</sup> Klaus Riebschläger, *Die Freirechtsbewegung* (Berlin: Duncker & Humblot, 1968), 12-13. Riebschläger also observes, 90-91, that the movement did not generally have a clear definition of the most basic concept of law (*Recht*) itself.

<sup>251</sup> Kantorowicz, *Kampf*, 10-12.

<sup>252</sup> *Ibid.*, 14.

relativistic world.<sup>253</sup> “We claim,” he insisted, “...that many legal cases allow of no legal solution at all.” For there was great human variety, and “our difference, particularly so far as it deals with the ranking of life-values [*Lebenswerte*], must express itself in the different solutions of at least a part of the cases [to be decided].”<sup>254</sup> In difficult cases, Kantorowicz held, the proper “balancing” of different values will not be determinable, and “other types of norms or the arbitrary will provide the decision—since after all a decision there must be.”<sup>255</sup> Legal science here entered its “voluntaristic phase.”<sup>256</sup> Prepared for the objection that reliance on “emotionally grounded values [*gefühlsmässige Werte*]” was completely incompatible with the “ideals of legality, of passivity, of reasonable justification [*Begründetheit*], of scientific character, of legal certainty, of objectivity,” he replied drily that such “postulates” partly had never been realized in practice, and partly did not deserve to be realized.<sup>257</sup>

This conception of judicial practice was, needless to say, deliberately far afield from the self-image of constructivist positivism. Kantorowicz’s own image of the constructivist judge—the “Byzantine ideal” of the judge as “logical machine”—was common to many critics of classical imperial legal thought, including Weber, Ehrlich, and Radbruch.<sup>258</sup> As he later put it with tongue in cheek, the constructivists believed the judge to be an “Automat” that dealt with each case through “subsumption under the statute” as follows: “one sticks the case in at the top, and extracts the decision below. Either the case is decided immediately within the statute, in

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<sup>253</sup> Monika Frommel, “Hermann Ulrich Kantorowicz: Ein Rechtstheoretiker zwischen allen Stühlen,” in Heinrichs, et al., eds., *Deutsche Juristen jüdischer Herkunft*, 636-37, claims that the early Kantorowicz was far from being a “decisionist,” but she does not offer any evidence to back up this denial. Since what has come to be known as “decisionism” in German legal literature is a species of voluntarism, which Kantorowicz emphatically endorsed in 1906 (distancing himself from it only somewhat later in life, this claim is perplexing and presumably only to be explained by a desire to acquit Kantorowicz of intellectual association with Carl Schmitt. As such, it provides another instance of the mistaken attempt to condemn philosophical positions held by individuals of widely varying political views on the basis of their later use by figures close to Nazism.

<sup>254</sup> Kantorowicz, *Kampf*, 16.

<sup>255</sup> *Ibid.*, 19.

<sup>256</sup> *Ibid.*, 20.

<sup>257</sup> *Ibid.*, 39.

<sup>258</sup> *Ibid.*, 7.

which case the decision falls out upon the first try; or it isn't, and one has to thump and shake the machine a bit." The latter procedure, he elaborated, involved such measures as selecting either a narrower or broader interpretation of the language of the text; using another legal rule from a different context; or using analogy or *argumentum e contrario*—but always remaining within the bounds of existing statute law.<sup>259</sup>

This mechanical picture might have been plausible if there were no reason for the judge to exercise independent will and to bring necessarily subjective value judgments to bear on a case. But the inevitability of lacunae in the positive law meant that more was required of the judge than the constructivist theory allowed, Kantorowicz insisted. In one of the more extreme formulations of the 1906 book, he remarked that there were "no fewer gaps than words" in the statutory and customary law taken together, and under such circumstances there was no system for formal logic to operate within.<sup>260</sup> The most telling point he raised against constructivism was that in practice, judges already engaged in "free law" adjudication under cover of the mere use of logic. They might even deceive themselves, but most legal constructions were ex-post rationalizations of the outcome that seemed most justified to the judges based on their own training and value sets. "We do not, in other words, accept a [legal] construction with all its consequences because it is the most unconstrained [*zwangloseste*], the most logical, the most natural, the best, but rather the other way around—a construction seems that way when its consequences are such that we can will them."<sup>261</sup> Judges might present their holdings in novel cases as reasoned by analogy to an established subsumption; but there were always possible

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<sup>259</sup> Kantorowicz, "Rechtswissenschaft und Soziologie," 279. *Argumentum e contrario* is a method of legal reasoning that is the opposite of and complement to analogy. For instance, if a type of conduct is not specified as prohibited amidst a list of comparable prohibited types of conduct, a judge may conclude that the conduct in question is permitted (even though no reference to it is made).

<sup>260</sup> Kantorowicz, *Kampf um die Rechtswissenschaft*, 15. Riebschläger, *Freirechtsbewegung*, 94, observes that Kantorowicz stood alone in this formulation of the gaplessness issue.

<sup>261</sup> *Ibid.*, 24.

commonalities to be observed between any number of different cases, and so analogical parallels could be drawn in virtually unlimited directions.<sup>262</sup> In the filling in of the omnipresent gaps, “it is always the will that leads the understanding on a leading-string,” and the reasons given merely covered the deeper, personal value-oriented grounds.<sup>263</sup>

Those who read Kantorowicz as moving toward a form of legal irrationalism would have found especially provoking his conclusion that “for us the *anti-rationalistic* disposition naturally also goes hand in hand with the voluntaristic current,” and they might not have been reassured by his insistence that it was only “juridical logic” rather than logic *tout court* that he was dismissing.<sup>264</sup> Nonetheless, he saw himself as describing a present and unavoidable situation rather than promoting irrationalism. It was better to acknowledge the situation openly and honestly and take measures to reduce judicial subjectivity rather than paper it over. Turning the tables on constructivist positivism, he argued that far from securing certainty, its method exacerbated the problem. Particularly in subsequent years, he emphasized that the Free Law movement’s “struggle” had “from the beginning” been oriented toward exposing and combatting the “hidden and *therefore* so dangerous subjectivism of conceptual jurisprudence.”<sup>265</sup> Classical imperial legal thought, in its purported lack of attention to the *purposes* of the law and to the social situation the law was designed to regulate, was likelier than Free Law to be the mere expression of hidden value judgments. “Where it should *interpret* [*auslegen*], it does not endeavor to ascertain the binding purposes of the statute, but rather clings to the dead letter often where the latter makes a mockery of these purposes. And where it must fill in the *gaps* of the statute—a situation that represents not the exception but rather the rule in all seriously

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<sup>262</sup> Ibid., 23.

<sup>263</sup> Ibid., 22.

<sup>264</sup> Ibid., 23, 25-26.

<sup>265</sup> Kantorowicz, “Methodenreform und Justizreform,” 264.

contentious cases—there it does not take hold of open, honest free law-finding [*freier Rechtsfindung*], but conjures the decision into the statute so that it can then artificially draw it back out.”<sup>266</sup>

In other words, Kantorowicz’s view both in *Kampf* and in subsequent defenses and elaborations of the Free Law program, was that in some cases no objective solution was possible, but that the constructivist attempt to pretend otherwise led in fact to a reduction in legal certainty and judicial objectivity by ignoring the social and economic purposes of the law in favor of logic games. He proposed that the major *positive* tenet of the Free Law movement, the need to bring social science to bear on judicial decisions, was best suited to restore whatever certainty and objectivity were available to the law. “Impersonality” and predictability in the application of the law would never be attained, but the “nonpartisan” character of the imperial judges could be improved by educating them in areas of the social sciences relevant to their specialization within the law.<sup>267</sup> The Empire’s judges faced criticism and dislike from the general population not because of any ill will on their part, but because of their ignorance of “social facts and viewpoints” and their “naïve class prejudices,” both of which would be reduced by educating judges in the results of sociological and economic studies.<sup>268</sup> Kantorowicz held to this conviction, expanding on it later in articles in the *German Judges’ Journal* and in his lecture at the first conference of the German Sociological Society in 1910. The judge, he said, must search out norms of free law with attention to the “needs of the present, the dominant ideas among the people, the interest-situation of the individual case and its typical sociological structure” while “incorporating the new norm into the system of the purposes pursued by the positive law.”<sup>269</sup>

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<sup>266</sup> Ibid.

<sup>267</sup> Kantorowicz, *Kampf*, 43, 45.

<sup>268</sup> Ibid., 46.

<sup>269</sup> Kantorowicz, “Methodenreform und Justizreform,” 269.

Even where there was no “gap” in the law but only a problem of proper interpretation, Kantorowicz argued that the judge’s best recourse was to social scientific studies making clear what the social purposes and effects of the laws in fact were. Much like Jellinek in this regard, and indeed remarking that in its use of sociological investigations, public law was probably the “healthiest” branch of the discipline, Kantorowicz called for statistical and qualitative studies of the effects of the civil and criminal statutory law, especially of the Civil Code, on economy and society.<sup>270</sup> Assimilation of this material would, he argued, help to alleviate popular discontent with the judges.<sup>271</sup>

However plausibly he argued these points, Kantorowicz’s embrace of the “voluntaristic phase” of legal science seemed to forebode not only subjective or willful interpretations of the existing law, but even decisions *against* the positive law. In fact, he called for such decisions in *Kampf*, stating that the judge should generally follow the “clear wording of the statute” but that he “may and ought to abandon [*absehen*] it, as soon as the statute seems to him not to offer a doubt-free decision; and second, when it is not probable that the government [*Staatsgewalt*] existing at the time of the decision would have come to the decision in the way demanded by the statute.”<sup>272</sup> Statements like these were what released a storm of protest, the “violent and intense excitement in the legal world” that Max Rümelin later associated with the publication of *Kampf*, and which, despite Rümelin’s overall sympathy for Kantorowicz, he saw as part of a common prewar tendency to “shout as loudly as possible,” thereby doing damage to the reputation of the legal profession.<sup>273</sup> And indeed, Kantorowicz himself quickly thought better of this statement.

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<sup>270</sup> Kantorowicz, “Rechtswissenschaft und Soziologie,” 281-84.

<sup>271</sup> Kantorowicz, “Methodenreform und Justizreform,” 272 and 397-98, n.242 on popular attitudes toward judges.

<sup>272</sup> Kantorowicz, *Kampf*, 41.

<sup>273</sup> Rümelin, “Developments in Legal Theory and Teaching During My Lifetime,” 19. Rümelin was certainly also thinking of the intemperate tone used by Kantorowicz’s friend and ally, the Karlsruhe lawyer and *Freirechtler* Ernst Fuchs.



As we have just seen, he held on to the desire for objectivity at least in the form of unpartisan decision-making, despite his more incendiary comments, and this may have induced him to reconsider. He responded to the criticism that he would allow the judge to decide *contra legem* (against the “clear wording of the statute”) throughout the years after 1906 mainly by denying that he had ever advocated it in the first place. Dropping the most contentious passages from the Italian edition of *Kampf* published in the following year, Kantorowicz argued that he had been misinterpreted by his critics who had invented a “Contra-Legem Fable” to portray the Free Law movement as “a kind of legal-philosophical anarchism.”<sup>274</sup> Instead, he emphasized that free law-finding may be introduced only in “subsidiary” cases, and never in cases where the positive law clearly provides for a particular holding, however much it may differ from the judge’s preferences. In this, as one distinguished historian of law has pointed out, he was really only calling for a renewed attention to the longstanding legal tradition of equity, which created new remedies when the old law did not suffice.<sup>275</sup> Voluntarism was not to indicate completely *arbitrary* will, Kantorowicz later specified, but a will shaped (if not determined) by long legal training.<sup>276</sup>

Even this more defensible post-1906 position was, of course, susceptible to the criticism that it was hard to determine in any objective fashion the social purposes and goals that the law should pursue. Where Jellinek had granted a degree of independence and objectivity to legal reasoning *within* the limited domain of the positive law, while the content of the latter was set by exogenous purposes to be studied by the social sciences, Kantorowicz instead sought to allow sociological findings and value judgments about social and economic policy to enter directly into

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<sup>274</sup> Kantorowicz, “Die Contra-legem-Fabel,” *Deutsche Richterzeitung*, No. 8/1911, reprinted in Gängel and Mollnau, eds., *Gesetzesbindung und Richterfreiheit*, 234-40, here 234; and “Rechtswissenschaft und Soziologie,” 287. For the changes to the Italian edition, see Silberg, *Hermann Kantorowicz und die Freirechtsbewegung*, 50.

<sup>275</sup> Kelly, *History of Western Legal Theory*, 360-61.

<sup>276</sup> Kantorowicz, “Methodenreform und Justizreform,” 267.

the law-creating activities of the judge. How were they to be determined without making law merely politics by other means? We will see below how he attempted, unsuccessfully, to answer this question, but first let us consider an obvious path that he did *not* take, for it reveals much about the nature of his commitment to the ideal of value- freedom.

Kantorowicz could have joined his teacher, Franz Liszt, and other Free Law advocates in rejecting relativism for moral objectivism. Liszt and other sociologically inclined jurists had sought to replace the positivist vision of objectivity—exclusion of values on the basis of the law/politics dualism—with a normative science of the law paralleling the normative economics of Schmoller, Adolf Wagner, and other members of the *Verein für Sozialpolitik*. In Liszt's case, he argued that the German criminal law *should* follow the evolutionary development ("progress") he said was manifested in the comparative study of national legal traditions in the West, away from the goal of societal retribution against criminals and toward measures for reforming and improving their lives.<sup>277</sup> Progress here was purported to be an objectively valid measure. Kantorowicz shared Liszt's views not only on societal purposes within criminal law, but also, of course, his rejection of constructivism and legal positivism; and his fellow Free Law advocates Eugen Ehrlich and Ernst Fuchs agreed that progressive social purposes could serve as standards, all of which might have inclined him to re-think his relativism.

Another potential inducement to making common cause in favor of a normative science was the fact that Kantorowicz did not, in his early career, find the methodological dualists' strict separation of Is and Ought persuasive.<sup>278</sup> He did not accept it as a logical distinction, nor did he

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<sup>277</sup> Liszt's views are discussed and critiqued in Gustav Radbruch, "Rechtswissenschaft als Rechtsschöpfung: Ein Beitrag zum juristischen Methodenstreit," *Archiv für Sozialwissenschaft und Sozialpolitik* 20:2 (March 1906), 355-70, and Kantorowicz, "Probleme der Strafrechtsvergleichung," 79.

<sup>278</sup> This fact has been addressed by Muscheler, *Relativismus und Freirecht*, 39-45, and Saliger, "Radbruch und Kantorowicz," 245-46, both of whom analyze the passages discussed here in accordance with each other and with my reading of Kantorowicz as well.

see the normative and the factual as self-contained realms studied by different sciences, preferring instead to adopt what has been called a “realist-psychological monism.”<sup>279</sup> In *Kampf*, Kantorowicz remarked that “too much emphasis is placed by the representatives of ‘methodological dualism’ [on the claim] that the social sciences represent what is, and the legal sciences what *should* be. For it may not be overlooked that all Ought [*alles Sollende*] is also an Is [*ein Seiendes*]. *Sollen ist Wollen*, if also a peculiarly tinged kind of will.”<sup>280</sup> In an effort the following year to mediate between Liszt’s and Radbruch’s opposed positions on the question of whether comparative law could provide the criminal law with a set of normative standards, Kantorowicz attempted to clarify his position further. He suggested that Radbruch’s dualism represented “a correct thought...described askew,” for Is and Ought were not logically speaking exclusive opposites. “All ‘Ought’ is actually always ‘Is,’ that is, either in the condition of actualization or as a wish in the soul of the person making the judgment. It is, then, not foreseeable why a kind of ‘Is,’ namely the ‘Ought,’ cannot be derived from another kind of ‘Is.’”<sup>281</sup>

However, he acknowledged, if there was no *logical* opposition there was still “a real opposition” within these two ideas, which is apparent from the nature of *Sollen* as will. “*Sollen ist Wollen*. If I say, ‘I ought,’ then at the same time I say ‘I will,’”—but this was a particular kind of will, accompanied by a sense of duty that differentiates it from other kinds of non-moral will [*nicht- oder unsittlichen Wollen*]. And instances of this “moral” will might come into conflict in the real world with each other and with a variety of types of non-moral will.<sup>282</sup> Explicitly relying

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<sup>279</sup> Saliger, *ibid.*, 245.

<sup>280</sup> Kantorowicz, *Kampf*, 33-34. The phrase *Sollen ist Wollen* is nearly impossible to translate because of the lack of adequate nominative and verbal forms of the word “ought” in English, but obviously equates the normative category of “ought” with the factual category of “will.”

<sup>281</sup> Kantorowicz, *Probleme der Strafrechtsvergleichung*, 80.

<sup>282</sup> *Ibid.*

here on Simmel's *Einleitung in die Moralwissenschaften* for support, he argued that there was no compelling reason to think that any one person's real, contingent will should hold any normative force over that of another person. In other words, while there was for Kantorowicz no logical problem in moving from Is to Ought when the latter was equated with the psychological fact ("Is") of will, there was indeed a problem in assuming that the factual existence of a "foreign" will could compel an equally factual state of the feeling of normative obligation in the individual. The factual existence of two conflicting wills was all that could be noted, and if one will came to 'acknowledge' the other, it was only the purely *psychological* process of persuasion that could be studied. Consequently Liszt, too, was mistaken in thinking that the fact of change in foreign laws could supply any grounds for German judges' having any normative *obligation* to change their holdings in accordance.<sup>283</sup>

Kantorowicz's path to the acceptance of value-free science did not, then, arise out of concern about the separation of Is and Ought and avoidance of the naturalistic fallacy of deriving the latter from the former. Instead, he rejected the idea of a normative science because his value subjectivism led him to see no compelling *reason* to favor one "will" or course of practical action over another, and thus to draw a sharp distinction between theory (based on reason) and practice (based on emotively tinged will). Because Kantorowicz's position was most determined by the theory/practice element of the value-freedom complex, it will not be surprising to find that he provided an account of precisely how science and values, theory and practice *could* relate to one another, and that this account was basically identical with that of Max Weber.

"It must now be asked," Kantorowicz wrote in one formulation in 1908-1909, "whether under this relativistic outlook (whose undeniable poignancy should not deceive one about its unavailability, and anyway is in many cases already recognized in one area, politics), a science

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<sup>283</sup> Ibid., 80-81; 92-93, 96-97 for further critique of Liszt's thesis on these and related grounds.

of the normative can yet exist. I affirm this.”<sup>284</sup> But he did not mean a “normative science,” for although scholarly consideration of values was essential, it must not unfold in “such a way that it [science] itself attempts to create that which ought to be [*das Sein-Sollende*]—there is no *normative science*...,” only a study of the implications of the “relative and subjective, not absolute and objective rightness of a value.”<sup>285</sup> For instance, using an example from the realm of aesthetic values, a scholar could not claim to decide whether the Pantheon or the Freiburg cathedral was more beautiful; rather, the “modest service” of science in this case was to provide reasons why one or the other was a greater realization of the criteria for beauty within its given style, or which would have been perceived as more beautiful by a historically given “individuality” such as an ancient Roman or medieval Freiburger.<sup>286</sup> Given one of many possible value sets to act as a standard, the scholar could determine how well a given instance of an artwork or a law lived up to it. “But the struggle to decide between all these possibilities objectively lies entirely outside the competence of science.... Thus legal philosophy can also, employing the psychological-historical-realistic method, construct for the culturally differing expressions of the feeling of justice the ideal laws corresponding to them respectively. And it can now decide whether, within one such expression, a particular legal rule possess a higher or lower value or no value at all, whether it receives a relative and subjective correctness or incorrectness. But it must entirely relinquish the not only futile but positively nonsensical attempt to determine in which value relation [*Wertverhältnis*] the individual legal ideals [themselves] stand.”<sup>287</sup>

The way in which scholarship could assess a given cultural object or action according to a given standard involved the determination of internal coherence within the value set, and of

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<sup>284</sup> Kantorowicz, *Zur Lehre vom richtigen Recht*, 27.

<sup>285</sup> *Ibid.*, 7; 27.

<sup>286</sup> *Ibid.*, 27-28.

<sup>287</sup> *Ibid.*, 28.

rational means to ends.<sup>288</sup> Schematically stated, for Kantorowicz a “science of the normative... treats what ought to be [*das Sein-Sollende*] as material empirically given to it, gathers and systematically orders it, clarifies the meaning of its individual elements, illuminates its relationships to the cultural values [of its time and place], and, as occasion demands, endeavors to determine the means and ways to its realization.”<sup>289</sup> In his own field, as he taught his students, the “relativistic method” required the deduction of specific legal conclusions from the given general purposes or goals (*Ziele*) of the law and “comparison of reality” with these goals so as to look for “gaps, contradictions, [and] obscurities” in the statutes and determine the appropriate “means” to removing them.<sup>290</sup>

As the reference to “cultural values” suggests, Kantorowicz was beginning to move toward Rickert’s methodological views. As his own thinking developed, he abandoned his “realist-psychological monism” for neo-Kantian dualism and came to see the distinction between Is and Ought as a purely logical one.<sup>291</sup> In later years, he would use Rickert’s distinction between individualizing and generalizing methods and his notion of value-relation to construct a six-part division of legal science according to method. Differentiating three spheres for scientific study—empirical reality, pure values and norms, and an intermediary sphere of “objective meaning” similar to Rickert’s, Weber’s and Radbruch’s notions of value-related cultural objects and meanings—Kantorowicz laid out a schema for the study of the corresponding areas of the

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<sup>288</sup> Kantorowicz, *Probleme der Strafrechtsvergleichung*, 102.

<sup>289</sup> *Ibid.*, 7; see also 37 for another clear statement.

<sup>290</sup> Lecture notes on *Rechtspolitik*, NL Kantorowicz II A 6, Folder 7 (not paginated or foliated). Interestingly, in citing literature on these themes, Kantorowicz does not refer here to Weber but to legal authors such as Ernst Zitelmann and Josef Kohler, neither of whom was an advocate of value-freedom.

<sup>291</sup> See his critical reviews of Eugen Ehrlich for mixing Is and Ought in *Schmollers Jahrbuch* 32 (1908), 349-52 and 1242. Also, in his lecture course on legal philosophy, dating to sometime between 1912 and 1915, he remarked that “*Rechtsrealistik nenne ich die Betrachtung der Wirklichkeit auf ihr Verhältnis zu den Rechtsnormen hin. Dies Verhältnis ist keineswegs das der Übereinstimmung; Sollen und Sein fallen bekanntlich nicht zusammen; das Vernünftige ist nicht notwendig das Wirkliche, das Wirkliche also auch nicht notwendig das Vernünftige...*” NL Kantorowicz II A 6, 53.

factual existence of the law, the meaning of the law, and the validity of the law. Each of the three areas could be studied in either an “individualizing” or a “generalizing” manner, producing respectively legal history and legal sociology in the first area, legal dogmatics and *allgemeine Rechtslehre* in the second, and legal politics and legal philosophy in the third.<sup>292</sup> Writing to Radbruch in mid-1915, he described this new methodological division, remarking “that my theory of legal science has made quite extraordinary progress,” and that he was very glad indeed to have waited to construct a major work of legal philosophy until now rather than having based it on the “unripe ideas” of his 1910 Frankfurt address to the Sociological Society or earlier.<sup>293</sup>

Although this schema would seem to allow legal dogmatics its own independent area, in fact Kantorowicz never relinquished his commitment to the Free Law movement, and this meant that he still had to confront the fundamental question posed earlier. That is, his rejection of a “normative science” in favor of value-free science seemed hard to square with the Free Law program for judicial decision-making on the basis of the willed imposition of value judgments hemmed in solely by the findings of sociological research. Sociology might provide judges with data about existing social and economic conditions, but as we have seen him contend, this data carried with it no inherent normative implications, and could be evaluated according to very different value standards.

In his 1910 address, concerned as it was with how sociology might inform legal science, Kantorowicz took a page from Jellinek’s book and argued that sociology might deliver knowledge of which social purposes and values were, *factually*, accepted as normatively binding

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<sup>292</sup> On this division, which Kantorowicz only began to elaborate during the years immediately following the period studied here, see Saliger, “Radbruch und Kantorowicz,” 246; Muscheler, *Relativismus und Freirecht*, 45-65; and Silberg, *Hermann Kantorowicz und die Freirechtsbewegung*, 74-84. The associated question of whether Kantorowicz should be seen as a methodological “dualist” or “trialist” properly belongs to the later phase of his legal philosophy and will not be further dealt with here; however, consideration of a similar—but not identical—version of “trialism,” that of Gustav Radbruch, will be examined in the following chapter.

<sup>293</sup> Kantorowicz to Radbruch, 11 August 1915, in NL Kantorowicz, IV B 19. Kantorowicz never did finish a major book-length work on legal philosophy, despite frequently announcing one both in correspondence and in print.

in a given time and setting. This would allow the judge to deploy such information in filling in “gaps” in all but the most difficult cases, without the judge himself being required to make the inherently subjective decision about what social purposes *should* be promoted by the law.<sup>294</sup> “In finding... rules of free law, the judge must...where possible hold to the particular value judgments dominant among the people. These value judgments... are, however, themselves facts of social life until they become re-formed [*umgeschaffen*] into norms (of free law) through their use as premises of judgment. The knowledge of these facts, which accordingly is indispensable to the fulfillment of the judge’s task but which unfortunately many judges lack, is thus to be learned through *sociological* channels.”<sup>295</sup> Consequently, Kantorowicz sided with other value-freedom proponents in criticizing the Verein für Sozialpolitik for primarily supporting research into measures of social reform rather than into pure sociological research, and criticized partisan research, whether socialist or social Darwinist in its principles.<sup>296</sup>

How were sociologists to provide the judge with such knowledge, however? What would signal to the sociologist that he had encountered an area of normative agreement that could genuinely direct the social purposes of the legal order? There were, after all, as he acknowledged in his criticism of Stammler’s revival of natural law, numerous and differing “*Gerechtigkeitsgefühle*.” Kantorowicz’s only answer to this question was to suggest that we “avoid the atomization of science, the cliff on which subjectivism is so often dashed,” when we recognize that out of these many possible viewpoints, “only those come into consideration as *culturally important* for legal philosophy as a science of values [*Wertwissenschaft*] which are in

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<sup>294</sup> Kantorowicz, “Rechtswissenschaft und Soziologie,” 300-301.

<sup>295</sup> Ibid., 288.

<sup>296</sup> Ibid., 284, 293-94.



accordance with a powerful social group.”<sup>297</sup> In practical terms, such an answer might have been plausible; as a solution to the theoretical problem, it simply begged the question, for the logical response would be to ask what criterion determined which social groups were to count as important.

Ultimately, Kantorowicz fell back upon the traditional injunctions to “ascetic objectivity,” with a relativist twist. In *Kampf*, he replied to objections that his theory opened the door to excessive and “uncontrollable” subjectivity by reminding the reader of the judge’s oath to render justice in good faith. “For, if we cannot rely on the oath of the judge, which requires earnest conviction, then it’s all over [*hört alles auf*].... Against excess subjectivity, the balancing of the plurality of minds [*Köpfe*] in the professional body of judges and the process of appeals offer enough protection.”<sup>298</sup> In the course of promoting a relativist approach to the scientific study of values that was strictly limited in the ways we delineated above, Kantorowicz also observed that relativism, like legal training, brought with it a psychological ability to understand any perspective in a calm and collected way. “Objectivists” were inclined to force their views on others, while “subjectivists” were content to build their own little kingdoms and ignore the outside world; the “golden middle path” was that of relativism. “As practical jurists,” he remarked, “we have been long accustomed to be conscientious advocates of others’ interests [*fremder Interessen*]; as theoretical jurists, we must with hard self-discipline acquire the same practice, *relativism*.”<sup>299</sup>

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<sup>297</sup> Kantorowicz, *Zur Lehre vom richtigen Recht*, 23. Muscheler, *Relativismus und Freirecht*, 42-43, observes that despite the Rickertian phrase “cultural importance” for the criterion, Kantorowicz was here still working under Simmel’s quasi-Darwinian or pragmatist model from the *Einleitung in die Moralwissenschaft* for determining what is to be counted as true, as valid, or even as important.

<sup>298</sup> Kantorowicz, *Kampf*, 41.

<sup>299</sup> Kantorowicz, *Probleme der Strafrechtsvergleichung*, 102-103, quotation on 103.

## Chapter 5.

### Gustav Radbruch and Neo-Kantian Philosophy of Law

Gustav Radbruch never really wanted to be a jurist. He preferred literary and philosophical studies from his earliest school days, and when he came to teach, the need to preoccupy himself with legal doctrine seemed a burden. Meeting Max Weber in April, 1904, shortly before giving his first lectures in criminal law at Heidelberg, he sadly resisted Weber's compliments on his work and invitation to contribute an article on legal philosophy to the new *Archiv für Sozialwissenschaft und Sozialpolitik*. But Weber was persuasive: "Upon my objection," Radbruch wrote to his parents, "that it has fallen to me to wend my way more into practical detail, he was of the opinion that I should not let myself be talked into it by the academic philistines [*Fakultätsbanausen*] and should work at what suits *me* best."<sup>1</sup> And that is precisely what Radbruch proceeded to do, both during his first, difficult decade at Heidelberg before the First World War, and during the rest of his eventful life as a professor, politician, and justice minister. Few studies of Radbruch's thought have failed to mark the impact of his elegant literary style, his insistence on the interdisciplinary study of law in the context of the humanistic disciplines, and his central role in revitalizing the earlier German tradition of legal philosophy.<sup>2</sup> Although he did substantive and respected scholarship on doctrinal questions of criminal law, Radbruch would always claim that he was not really meant to be a lawyer,<sup>3</sup> but that he was

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<sup>1</sup> Undated letter of April, 1904, in Gustav Radbruch, *Briefe I (1898-1918)*, ed. Günter Spengel, *Gustav Radbruch Gesamtausgabe* [hereafter *GRGA*] Vol. 17 (Heidelberg: Müller, 1991), 49. It should be noted that this edition of Radbruch's correspondence omits many letters, some of them important, which are preserved in the *Nachlass* at the Universitätsbibliothek, Heidelberg; letters cited according to the *Nachlass* catalogue numbers in this chapter are not contained in the *GRGA* volumes. All translations in this chapter are my own; preference has been given to fidelity over style.

<sup>2</sup> For a representative instance, see Günter Spengel, *Jurist in einer Zeitenwende: Gustav Radbruch zum 100. Geburtstag* (Heidelberg: Müller, 1979).

<sup>3</sup> Radbruch to his father, 4 June 1903, in *Briefe I*, 31.

possessed of a “*Zwischenbegabung*,” a talent for work that lay between established fields.<sup>4</sup> He was therefore well situated for a career in legal philosophy and the intellectual history of law, making the law accessible to those of a humanist bent while simultaneously reminding fellow jurists to write readably and with philosophical soundness.

Still little known in the English-speaking world, Radbruch (1878-1949) is regarded in Germany as one of the country’s major twentieth-century legal philosophers, alongside such figures as Hans Kelsen and Carl Schmitt. While Kelsen’s work is familiar owing to his long residence in the United States and many publications in English, he is not the only major voice of neo-Kantian philosophy of law. Radbruch, too, drew on neo-Kantian sources in the construction of a view of legal philosophy and legal science which is quite different from Kelsen’s, and closely aligned with the doctrines of fact-value dualism and freedom from value-judgment which we have examined in previous chapters. Like his close friends Kantorowicz and Lask, he belonged to a younger generation than the social scientists involved in the *Werturteilsstreit* or their colleagues Windelband, Rickert, or Jellinek. Radbruch’s thought thus offers an opportunity to trace the impact of the ideas involved in the value-freedom complex on a jurist whose thought was shaped during the height of the debates. But we should take care: it is not quite correct to say, as some have done,<sup>5</sup> that Radbruch’s legal philosophy is simply a translation into the field of law of southwest-German neo-Kantianism and Weberian relativism. Radbruch himself was an active participant in the Heidelberg soirées and discussion groups of the pre-war decade, whose own views influenced those of his friends and colleagues.

Previous studies of Radbruch have focused almost obsessively on the question of whether he changed his views on natural law, legal positivism, and value-relativism during the last period

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<sup>4</sup> Radbruch to Karl Jaspers, 28 June 1914, in *Briefe I*, 178.

<sup>5</sup> Ralf Dreier and Stanley L. Paulson. “Einführung in die Rechtsphilosophie Radbruchs,” in Gustav Radbruch, *Rechtsphilosophie*, Studienausgabe, ed. Dreier and Paulson (Heidelberg: Müller, 1999), 237-38.

of his life, from 1945 until his death four years later, as he returned to teaching in Heidelberg after enforced retirement during Nazi rule.<sup>6</sup> In what became the notion most closely associated with his name, the so-called “Radbruch Formula,” he argued in some of his many post-1945 essays that there may be a *limited* number of situations in which considerations of justice can outweigh considerations of legal certainty in the rendering of judgment: an “intolerably” unjust law must be regarded as flawed law and must yield to the claims of justice when pressed; while a proposed or executed law that makes *no attempt* whatever at justice never really achieves the status of law at all.<sup>7</sup> Provoked of course by the glaring injustices of law under the Third Reich, Radbruch’s late reflections, which can be only crudely summarized here, raise the question of whether this famous relativist and (according to most commentators) legal positivist ended his career with an appeal to natural law—and if so, the degree to which his last views reflected continuity or discontinuity with his earlier thought.

This question has been the primary subject of the few English-language publications on Radbruch over the years, including some recent essays and translations of Radbruch’s own late papers.<sup>8</sup> It will not be pursued further here. Nor will his Weimar-era academic and political career, which has understandably been the principal focus of scholarship on his politics, democratic theory, and his legal philosophy in the definitive form given it by the third edition of

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<sup>6</sup> The problem is discussed in almost every secondary study of Radbruch’s thought cited in this chapter. See in particular Wolfgang Lohmann, “Versuch einer methodologischen Erörterung der Radbruchschen Rechtsphilosophie, zugleich Beitrag zum Thema ‘Umbruch oder Entwicklung in Gustav Radbruchs Rechtsphilosophie,’” Inaugural Dissertation, Eberhard-Karls-Universität zu Tübingen, 1964.

<sup>7</sup> See, for instance, Radbruch, *Vorschule der Rechtsphilosophie* (Willsbach: Scherer, 1947); Hidehiko Adachi, *Die Radbruchsche Formel : eine Untersuchung der Rechtsphilosophie Gustav Radbruchs* (Baden-Baden: Nomos, 2006). Of the older German literature that addresses primarily Radbruch’s last period, see especially Fritz von Hippel, *Gustav Radbruch als Rechtsphilosophischer Denker* (Heidelberg: Schneider, 1951).

<sup>8</sup> See primarily Stanley L. Paulson, “Radbruch on Unjust Laws: Competing Earlier and Later Views?” *Oxford Journal of Legal Studies* 15:3 (1995), 489-500; Paulson, “On the Background and Significance of Gustav Radbruch’s Postwar Papers,” *Oxford Journal of Legal Studies* 26:1 (2006), 17-40, along with the subsequent translations; and, disputing Paulson’s continuity thesis and reasserting the traditional view, Torben Spaak, “Meta-Ethics and Legal Theory: The Case of Gustav Radbruch,” *Law and Philosophy* 28:3 (2009), 261-90.

his *Rechtsphilosophie* (1932).<sup>9</sup> Rather than go over such well-trodden ground, this chapter will offer an examination of Radbruch's life and thought during the Wilhelmine era, when he wrote the first editions of his two most influential books. Only one study of Radbruch's legal philosophy has dealt separately with his thought during his first Heidelberg period (1903-1914) at all, and this only briefly and only on the basis of his main early work, the *Grundzüge der Rechtsphilosophie* (1914).<sup>10</sup> This approach has the somewhat distortive effect of making Radbruch's thought appear a mere expression of ten years' worth of the influence of the Weber circle, when the reality was more complex.

Overall, during this period, Radbruch's position may be summarized as follows. The broadest task of the philosophy of law is not just to give a general theory of existing laws and their interrelation (*allgemeine Rechtslehre*) in the manner of the still-dominant positivist school. Rather, it is to provide an account of the conditions for the possibility of any law at all, in the manner of neo-Kantian critical philosophy. But this account, for Radbruch, will yield purely *formal* results. So, despite rejecting pure positivism, legal philosophy does not provide knowledge of natural law either. At most, it lays out a "natural law with changing content" in the words of the neo-Kantian Rudolf Stammler—it provides insight into requirements which apply universally but formally to all law while acknowledging that the specific "content" of legal rules and even whole legal orders may change with time. The traditional normative vision of natural law is rejected as unscientific in light of the distinction between "is" and "ought," facts

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<sup>9</sup> See Martin D. Klein, *Demokratisches Denken bei Gustav Radbruch* (Berlin: BWV, 2007); Marc André Wiegand, *Unrichtiges Recht: Gustav Radbruchs Rechtsphilosophische Parteienlehre* (Tübingen: Mohr-Siebeck, 2004); Holger Otte, *Gustav Radbruchs Kieler Jahre, 1919-1926* (Frankfurt: Lang, 1982); Michael Gottschalk, "Gustav Radbruchs Heidelberger Jahre, 1926-1949," Inaugural Dissertation, Christian-Albrechts-Universität zu Kiel, 1982.

<sup>10</sup> Paul Bonsmann, *Die Rechts- und Staatsphilosophie Gustav Radbruchs*, 2d ed. (Bonn: Bouvier, 1970). No discussion of Radbruch's early thought is available in English, nor has the Heidelberg *Nachlass* been used for this period in the German literature.

and values or norms and the impossibility of logically deriving an “ought” statement from an “is” statement.

Accepting the fact-value dualism, Radbruch nevertheless agrees with the Southwest neo-Kantians that law belongs in the category of “cultural sciences” that are neither purely value-free nor purely normative but rather “value-related.” Law is thus demarcated as a sphere of study by its “relation” within a given culture to legal values, which culminate in the ultimate, formal legal value of justice. This ultimate value, however, really presents three co-equal aspects or sub-values: justice, expediency or purpose (*Zweck*), and legal certainty (*Rechtssicherheit*). Radbruch parts from his philosophical allies, however, in maintaining an avowedly antinomian and relativistic doctrine regarding these three legal values, as well as the differing political worldviews that give content to the law through the second value of purpose (*Zweck*). In other words, he maintains that there is no rational or scientific way of deciding between these values and worldviews in those cases in which they come into conflict; though politically a social democrat, he, like Weber, is philosophically an “agonistic liberal.” This position leads Radbruch to a moderate degree of opposition to the positivist notion of the “gaplessness” of the law, and to a moderately decisionist solution to the question of the validity of legal judgments in “hard cases.” Because of the inherently normative nature of those types of legal pronouncements that must be resolved by decisions based on non-rational value-judgments—legislation and judges’ rulings are unproblematically normative—Radbruch does not feel the need to grapple with the problem of objectivity in the manner Weber did for the historical sciences. Rather, in his early writings, Radbruch implicitly relies on the existence of a method of casuistry that is supposed to have more than arbitrary validity.

Naturally, all of the foregoing will be elaborated below in Section II on the basis of the full range of Radbruch's pre-war scholarly production. First, however, we must explore the sources of his views on values, value-judgments, and rationality in the juristic sciences.

## **I. Growth of a Legal Philosopher: The Early Radbruch, 1878-1918**

Like Thomas Mann, who was a classmate at the Katharineum Gymnasium, Radbruch was born in the old Hanseatic city of Lübeck. And although he was to spend most of his life in Heidelberg and Berlin, like Tönnies he had a deep love for his Schleswig-Holstein homeland. In the autobiographical writings he dictated to his wife as the bombs were falling on Germany in the spring of 1945, he reflected on the happier days of his early youth. His evocative portrait of Lübeck is worthy of *Buddenbrooks*<sup>11</sup> and "Tonio Kröger": at Christmas time the *Weihnachtsmarkt* in the shadow of the old town hall, when the bearded Italian organ-grinders would visit and appear dark-eyed under the windows; the merriment the children shared with the town fools whom they both loved and teased; the docks and warehouses of the harbor by the river Trave, with a summer smell of dust and grain and anise; the merchants' offices lined with high double-desks that held old-fashioned presses and envelopes festooned with foreign stamps. Above it all, he recalled the hourly chorales of the Marienkirche carillon that carried over the entire city from the church near the Radbruch home.<sup>12</sup>

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<sup>11</sup> Radbruch was, it might be noted, an early and enthusiastic reader of Mann's *Buddenbrooks* (1900): he wrote his parents in 1903 that he was reading the novel for a second time "with deep pleasure." Letter of 1 April 1903, in Heidelberg HS 3716 (hereafter cited as NL Radbruch) III.A.3.

<sup>12</sup> Gustav Radbruch, *Der Innere Weg: Aufriß meines Lebens*, 2d. ed. (Göttingen: Vandenhoeck & Ruprecht, 1961), 10; reprinted in *GRGA* Vol. 16, ed. Günter Spengel, *Biographische Schriften* (Heidelberg: Müller, 1988), 167-297. Although completed late in life, his memoirs drew directly on his letters and notes, often repeating phrases and thoughts from them. References to Radbruch's works in this chapter will generally be to the original editions, as the original-edition paginations are noted throughout the text of the *GRGA*.

This house in the Fleischhauerstraße was the residence of Heinrich Radbruch, a comfortable small businessman involved in the sugar and wine trades and in fire insurance, and his half-French wife. Gustav Radbruch was the youngest of their three children. The general impression given both by his memoirs and by his many letters to his parents after he left Lübeck is of a quiet, supportive, and loving family life. Radbruch had a great deal of affection for his mother, and was quite distraught when she grew weak from diabetes and died during World War I.<sup>13</sup> He clearly felt, though, that his own “nature” owed most to his father, who belonged to the “tradition-bound variety of the ‘respectable merchant,’” and who “later came to terms quite difficultly with the modern, ever more instrumentally-rational commercial world.”<sup>14</sup> The older Radbruch possessed a sort of romantic love of poetry, beauty, and noble gestures, and was an optimist with a strong “belief in the good in things and in people,” all of which would mark his son as well. A National Liberal who, Radbruch later thought, must have seen social democracy as rather foolish, the father was a tolerant man who found it easy to be forbearing and even supportive of Radbruch’s political activity for the SPD.<sup>15</sup> He helped inculcate a fascination with the concrete details of history in his son, although Radbruch also noted with some regret that his upbringing was lacking in attention to natural science and music, and that there was very little religious devotion in his family home.<sup>16</sup> The only gently critical remark Radbruch made about his father in his memoirs is, however, a significant one for the purposes of our argument: he suggested that the one way in which his father held him back was in keeping him sheltered from

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<sup>13</sup> See, for instance, Karl Jaspers to Radbruch, 30 June 1914, in NL Radbruch III.F.561.1. Jaspers, as a psychiatrist, had provided counseling for Radbruch in the previous few years, as well as (in this case) medical advice for his mother’s care.

<sup>14</sup> Radbruch, *Innere Weg*, 14-15.

<sup>15</sup> *Ibid.*, 16, 19.

<sup>16</sup> *Ibid.*, 17-18.



perceived dangers and thereby preventing him from growing accustomed as necessary to “courage, decisiveness, and independence.”<sup>17</sup>

As a student at the Lübeck Gymnasium, which had occupied the Katharinen cloister since the time of the Reformation, Radbruch was a “model youth,” more owing to his “sensitive conscience” than to any particular ambition.<sup>18</sup> He worked hard at his mathematical studies and did well despite having little natural interest in them—a good preparation, he as he reflected, for his later legal coursework—and gained the usual rigorous training in classical literature and basic philology as well as a sense of the importance of “a succinct [*knappen*] and exact style.”<sup>19</sup> His passion then, as it would be during his university days, was literature, and particularly poetry. Among his favorite writers were Theodor Storm, Gerhart Hauptmann, and the now largely forgotten poet Carl Busse, to whom Radbruch dared to write an unsolicited letter. He received a reply from Busse telling him to visit someday when he was a little older, but Radbruch never did, because, as he said, “at that time I already had other Gods.”<sup>20</sup>

This last formulation might bring to mind the notional “paganism” or “polytheism” of Goethe<sup>21</sup> or Weber, two of the more important influences on Radbruch, but it was not entirely a symbolic or ironic figure of speech, for he also had a lifelong fascination with Christianity. Despite the relative “coolness” with regard to religious practice in the family home, Radbruch found himself compelled to turn and return to reflections on God and religious devotion at various times. In his schooldays, his overactive conscience and feelings of guilt induced a kind

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<sup>17</sup> Ibid., 18: “Mut, Entschlossenheit und Selbstständigkeit.”

<sup>18</sup> Ibid., 24. This self-description is accurate, as familiarity with his early correspondence amply demonstrates.

<sup>19</sup> Ibid., 22-23.

<sup>20</sup> Ibid., 27.

<sup>21</sup> The role played by Goethe in Radbruch’s thinking and writing has been exhaustively documented in Berthold Kastner, *Goethe im Leben und Werk Gustav Radbruchs* (Heidelberg: Müller, 1999). However, as Kastner shows (see 25-26, 30), despite his affinities with Goethe’s worldview and the obligatory essays on the German classics in his schooldays, Radbruch did not begin to read the poet seriously as a thinker until 1916, and thus Goethe does not figure in our discussion here.

of ascetic practice of prayer (*Gebetsaskese*).<sup>22</sup> This did not last, and likely had little of properly religious substance to it, but a more mature reckoning was hinted at, during his first Heidelberg years, in a growing number of references to the need to take into account a religious perspective as one of several approaches to value-philosophy.<sup>23</sup> While serving at the front in 1916, he recorded in his journal his struggle to resolve the contradiction between the “dyed-in-the-wool” respect for military service that had been with him since childhood through the historical studies he had shared with his father, and his growing socialist convictions. “And I resolve this contradiction in the only way in which each contradiction, about which one has honestly but unavailingly agonized, resolves itself: religiously.”<sup>24</sup>

A few months later, he thought his friend Kantorowicz might be surprised at his new interest in the philosophy of religion, but wrote him that “for me, each thing has a double philosophy: value-philosophy...and a philosophy beyond value and disvalue [*Unwert*]: that is, philosophy of religion or metaphysics.”<sup>25</sup> This interest found expression not only in his later *Rechtsphilosophie*<sup>26</sup> but in a slim volume on the philosophy of religion written with the theologian Paul Tillich soon after the war.<sup>27</sup> In his last years, Radbruch not only (temporarily) expressed high hopes for the new Christian Democratic Party, but at least considered converting to Catholicism. Ever since he had fallen in love with a Catholic girl as a young student in Lübeck, he had maintained his “lifelong reverence” for the “beauty of Catholic belief and liturgy [*Kultus*].”<sup>28</sup> Though never ultimately a believing Christian, according to his student Arthur

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<sup>22</sup> Radbruch, *Innere Weg*, 18.

<sup>23</sup> See, for instance, Gustav Radbruch, “Über den Begriff der Kultur,” *GRGA* Vol. 4, p. 11-17, here p.13. Originally appeared in *Logos* 2 (1911-12), 200-207.

<sup>24</sup> 1916 Kriegstagebuch I [20 April-21 May 1916], p. 21, NL Radbruch I.C.1-17: “Und ich löse diesen Widerspruch so, wie sich allein jeder Widerspruch, an dem man sich redlich aber vergeblich gequält hat[,] sich löst: religiös.”

<sup>25</sup> Radbruch to Kantorowicz, 9 July 1916, in *Briefe I*, 220.

<sup>26</sup> Radbruch, *Rechtsphilosophie*, 3d. rev. and exp. ed. (Leipzig: Quelle & Meyer, 1932), Section 12.

<sup>27</sup> Radbruch and Tillich, *Religionsphilosophie der Kultur: Zwei Entwürfe* (Berlin: Reuther und Reichard, 1921).

<sup>28</sup> Radbruch, *Innere Weg*, 26.

Kaufmann, Radbruch even went so far as to have a Catholic priest perform the last rites at his death.<sup>29</sup>

His literary and religious interests remained avocations, however, for when it came time for Radbruch to begin his university studies, he had little choice but to enroll in the legal faculty. It was understood that Radbruch was to be a jurist: his father thought it the best use of his talents, and he was not inclined to question his father's judgment.<sup>30</sup> The opportunity to begin university studies was an exciting one, regardless of his ambivalence about the law, because it was a passport to the larger world. Much affection as he had for Lübeck, its limitations were clear, and he later noted that "the oppressive [*drückende*] feeling of having to pursue a predetermined path within these narrow walls led me, like other young Lübeckers, to decide to seek a professional occupation outside of Lübeck."<sup>31</sup> The city, with its oligarchy of merchants and lawyers, seemed at least in retrospect as though it "spoke to us not with the voice of the future, but with the voice of the past."<sup>32</sup> And so Radbruch, just like Thomas Mann, left for Munich.

He remained for one term, during the summer of 1898, long enough to develop a robust appreciation for the Bavarian capital's cultural and artistic life. Living there strengthened his literary interests and helped him cultivate his taste in painting, sculpture, and theater. As he wrote to a school friend, his legal studies bored him, but he was enthusiastic about Munich, its beer, and its art, and he planned to see the Secession's exhibition.<sup>33</sup> The semester was not entirely without academic gain: the Romanist Bechmann gave him a solid introductory foundation in the study of law,<sup>34</sup> and he was enthralled by Lujo Brentano's historical-

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<sup>29</sup> Arthur Kaufmann, *Gustav Radbruch: Rechtsdenker, Philosoph, Sozialdemokrat* (Munich: Piper, 1987), 168-71.

<sup>30</sup> Radbruch, *Innere Weg*, 19.

<sup>31</sup> *Ibid.*, 11.

<sup>32</sup> *Ibid.*, 9.

<sup>33</sup> Radbruch to Hermann Stolterfoht, 5 May 1898, in *Briefe I*, 12.

<sup>34</sup> Radbruch's dense notes on this course, "Einleitung in die Rechtswissenschaft," are preserved in NL Radbruch II.B1. Section 3 of the course treated the separation of law and morals.

methodological lectures on economics (*Nationalökonomie*). In retrospect, these lectures seemed to Radbruch to have planted the “first roots of my later socialistic convictions,” although at the time what impressed him most was the fact that “no science is so divided into parties as is economics [*Volkswirtschaftslehre*].”<sup>35</sup>

Nevertheless, the book that made the greatest impression on him during this time was Rudolf Sohm’s *Institutionen* on the history and system of Roman private law, and so Radbruch transferred in the fall to Sohm’s university, Leipzig, in part to hear him lecture. Then at its height, Leipzig offered one of the best legal faculties in Germany, as well as a unique collection of social scientists oriented toward the “nomothetic” approach.<sup>36</sup> Aside from Sohm, who was the “greatest jurist, as teacher and thinker” that Radbruch encountered as a student, and whose lectures on canon law impressed him with their profound conception (*Auffassung*) of Christianity,<sup>37</sup> he also studied with the refined and eloquent professor of criminal law Carl Binding. Binding awoke Radbruch’s interest in criminal law, although not in the way the professor would have wanted: in the course of warning his students against attempts to mix the results of sociological and criminological studies with legal doctrine in the interpretation of the positive law, he condemned as “dangerous” the work of his academic antagonist, Franz von Liszt, for this very reason. Radbruch immediately sought out Liszt’s work and was persuaded of the importance of cross-disciplinary fertilization in the criminal law.<sup>38</sup> He remained three semesters in Leipzig, studying not only law but economics, history, and philosophy and psychology, with the eminent Karl Bücher, Karl Lamprecht, and Wilhelm Wundt respectively.

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<sup>35</sup> Radbruch, *Innere Weg*, 31; letter of 5 May 1898, to Stolterfoht, in *Briefe I*, 11. Radbruch was, however, so bored by the economist Lotz that he once began ostentatiously reading a newspaper during his lecture, gaining a “well-deserved warning” for it.

<sup>36</sup> On the Leipzig tradition in social science, see Woodruff D. Smith, *Politics and the Sciences of Culture in Germany, 1840-1920* (New York: Oxford University Press, 1991).

<sup>37</sup> Radbruch, *Innere Weg*, 35. Sohm’s work was, it may be noted in passing, also the source of the modern revival of the concept of charisma that became so influential through Max Weber.

<sup>38</sup> *Ibid.*, 34.

His memoirs note the strong impression of devotion to truth and objectivity (*Sachlichkeit*) made by Bücher and Wundt, but also the draw of Lamprecht's fiery passion for a new method in the historical sciences: despite a Lübeck historian's warning that Lamprecht was a "swindler," Radbruch recalled that he and his fellow students had read each of Lamprecht's polemics upon publication and quickly became convinced partisans of his approach.<sup>39</sup>

Drawn to work with Liszt on criminal law and to return to a cultural capital once more, he spent his final year in Berlin in 1900-1901, passing his state legal exam in the spring of 1901 after the statutory minimum of six semesters' university study. As was customary, Radbruch then undertook a year as Referendar, or attorney-in-training, in Lübeck, but disliked the practice of law and got Liszt's support to end this practicum-year early and return to Berlin to do his doctoral dissertation.<sup>40</sup> This first work of Radbruch's, a short contribution on the theory of "adequate causation" in the determination of legal liability, provoked by a recent book by the jurist Max Rümelin, was completed in May, 1902. Despite his persisting anxieties, his dissertation was accepted and he passed his oral examinations; he reported to his parents that the Dean had commended him on an unusually impressive performance and remarked that he had a "calling for the lectern" if he was inclined toward an academic career.<sup>41</sup>

He was so inclined: anything to avoid a career in the practice of law. Liszt advised him to forego the rest of his Referendar training and pursue habilitation with the distinguished Heidelberg criminal law professor Karl von Lilienthal, offering him the use of the Berlin Kriminalistisches Seminar and its resources while he worked.<sup>42</sup> Radbruch was disposed to

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<sup>39</sup> Ibid., 35-36. Radbruch's notes from Wundt's lectures on philosophy, logic, and psychology have survived and could possibly provide insight into his earliest thinking on philosophical themes; however, I was unable to read their handwriting.

<sup>40</sup> Kaufmann, *Gustav Radbruch*, 42.

<sup>41</sup> See letters of 14 and 28 May, 1902, in *Briefe I*, 15, 19.

<sup>42</sup> Radbruch, *Innere Weg*, 59. Liszt first suggested habilitation at Kiel, and then Heidelberg once a spot had opened up in the fall of 1902.

accept; however, apart from a final attempt at tolerating his Lübeck practicum, he spent the summer and early fall of 1902 traveling, particularly back to Munich where he had hoped to do his military service but was excused on health grounds. He wrote his parents in September from Munich that he would prefer to take a break from “producing” scholarship and stay out of “society” in order “to perfect my philosophical training first through systematic familiarization.” Though he recognized this might not be the most “practical” course, he felt that “my scientific conscience requires it.”<sup>43</sup>

It would appear that this further philosophical training was initially in the “positivistic” tradition to which Radbruch had been exposed at Leipzig and by Liszt, leavened by Schopenhauer’s pessimism.<sup>44</sup> But his interests were eclectic. While visiting Heidelberg for the first time in January of 1903, he planned to attend the lectures of the important but aging neo-Kantian philosopher Kuno Fischer (although he would not seriously engage with neo-Kantian thinking until the fall of that year).<sup>45</sup> Thought-provoking, though unremarked in the literature on Radbruch, is the interest he took in the Austrian philosopher of language Fritz Mauthner in March of 1903, as interpreted by the socialist-anarchist writer Gustav Landauer.<sup>46</sup> During that month, Radbruch attended several talks by Landauer on Mauthner’s philosophy in Berlin, which he reported enthusiastically to his father in three notable but as yet unpublished letters, remarking that he had been quite impressed.<sup>47</sup> As Landauer published his short book on Mauthner at just that time, we have a good sense of what would have been said in the public lectures. Emphasizing the inadequacy of language to convey the immediacy of experience,

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<sup>43</sup> Radbruch to parents, 20 September 1902, NL Radbruch III.A.2. [“meine philosophische Ausbildung zunächst durch systematisch Einarbeiten zu vervollkommen.”]

<sup>44</sup> Radbruch, *Innere Weg*, 63.

<sup>45</sup> Radbruch to parents, 16 January 1903, in *Briefe I*, 23.

<sup>46</sup> See the three letters to his father of 12, 18, and 20 March 1903, NL Radbruch III.A.3; on Mauthner, who was also living in Berlin at the time, see Allan Janik and Stephen Toulmin, *Wittgenstein’s Vienna*, Ch.5.

<sup>47</sup> Radbruch to parents, 20 March 1903, NL Radbruch III.A.3.

Mauthner was famous for his injunction that a consistent philosopher will embrace silence. Landauer's account laid out the skepticism and nominalism inherent in Mauthner's position, writing for instance that "there is no connection that we could prove and use for daily life between the universe and human action, between God and morality; there exists only our *will* to shape a picture of the world as we can grasp and love it, and to form our lives and our institutions [*Einrichtungen*] in accord therewith."<sup>48</sup> Our words, even highly evolved technical terms, could be seen only as engaged in a rough and blundering relation to reality. And we were learning to become accustomed to the inevitability of "an undertone of irony, of *à peu près*, of the provisory, of the metaphorical" and of the need for a "revaluation" (*Umwertung*) in all areas of specialized knowledge—not just, as Nietzsche said, in ethics, but in such areas as aesthetics and jurisprudence too.<sup>49</sup> Paring away the ways in which metaphor, anthropomorphism, and other language mistakes had clouded our understanding, Landauer concluded that the practical lesson of Mauthner's work was the untenability of a religious worldview and the need in our modern situation for resignation, "epistemological passion, and... courageous pride"; indeed, he argued that Mauthner's skepticism was "the trailblazer for new mysticism and new strong action."<sup>50</sup>

Radbruch was concerned philosophically at that time both with a specialized technical language and with the concept of action in his legal work. He devoted most of 1903 to the completion of his Habilitationsschrift, *Der Handlungsbegriff in seiner Bedeutung für das Strafrechtssystem* (*The Concept of Action in Its Significance for the System of Criminal Law*).<sup>51</sup> This work, the main portion of which was devoted to analyzing the legal concepts of action and

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<sup>48</sup> Gustav Landauer, *Skepsis und Mystik: Versuche im Anschluss an Mauthners Sprachkritik* (Berlin: Fleischel, 1903), 81-82.

<sup>49</sup> *Ibid.*, 134.

<sup>50</sup> *Ibid.*, 154; 6.

<sup>51</sup> Radbruch, *Der Handlungsbegriff in seiner Bedeutung für das Strafrechtssystem, zugleich ein Beitrag zur Lehre von der rechtswissenschaftlichen Systematik*. Berlin: Guttentag, 1903.

will, and the attribution of guilt or liability in criminal and tort law, was very troublesome for Radbruch. He presented a talk on the subject at the seminar of the Berlin psychologist Carl Stumpf in May while it was still in gestation,<sup>52</sup> and it surely formed one of the topics of conversation in the legal philosophy discussion group Radbruch started at this time alongside his new friend Kantorowicz and several other Berlin students.<sup>53</sup> But when he submitted it to Lilienthal, it was too short to be accepted; Radbruch's decision to lengthen it by adding a methodological section turned it into what he later called "a strange monster..., half criminal law doctrine, half general theory of law [*allgemeine Rechtslehre*]."<sup>54</sup> It became such a torture to write that his father invited Radbruch to stay with him at a hotel in the Harz mountains where he could provide his son with quiet surroundings and moral support. And when finally finished in the early fall, the dissertation's lengthy digression into general theory of law meant that it was necessary for Lilienthal to have Heidelberg's resident legal theorist, Jellinek, vouch for it alongside him—evidence, Radbruch later remarked, of Jellinek's "human and scientific tactfulness [*Feingefühl*]."<sup>55</sup>

This was not, perhaps, the most auspicious entry into the academic world of the city on the Neckar, and Radbruch felt that he had taken too long in the writing. But that was not really the case—he was just about to turn twenty-five—and indeed the real problem was that he was not yet properly prepared to be a Privatdozent, and thus both a teacher and a member (with academic and social duties) of a law faculty. His sense, at the time and in later recollection, of being immature, would lead to unnecessarily strained relations with some of the Heidelberg

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<sup>52</sup> See letter of 29 May 1903, NL Radbruch III.A.3.

<sup>53</sup> See letter of 3 June 1903, in *Briefe I*, 30.

<sup>54</sup> Radbruch, *Innere Weg*, 60.

<sup>55</sup> *Ibid.*, 59-60.



faculty and contributed to the discomfort he felt during his first decade there, as well, most likely, as the slightly longer than average time he took to receive a call to a professorship.<sup>56</sup>

During his years as a Privatdozent from 1904 to 1914, Radbruch taught courses primarily in criminal law, criminal procedure, and philosophy of law. He drew students only slowly: in his first two semesters in 1904, only two or three students showed up at the lectures he offered.<sup>57</sup> The tally was only marginally better the following year, but he began to hone his teaching, resolving to lecture without a text or even notes, and gaining thereby some facility in public speaking.<sup>58</sup> He later remarked that his efforts during this decade lay primarily in the direction of improving his teaching as opposed to scholarship—Heidelberg was not, he claimed, an environment as conducive to diligent work as it was to the things of the spirit.<sup>59</sup> But it was in this period that he wrote his two most popular books, the *Einführung in die Rechtswissenschaft* (*Introduction to Legal Science*, 1910) and the *Grundzüge der Rechtsphilosophie* (*Outlines of Legal Philosophy*, 1914), which were to go through many editions during his lifetime, as well as numerous articles and a steady stream of book reviews.<sup>60</sup> In 1907, the year Radbruch married his first wife, he and Kantorowicz attempted to start a journal that would be receptive to sociological and philosophical studies of law, but the plan fell through owing to lack of support from Jellinek and Windelband, who were needed to persuade the publisher.<sup>61</sup> That same year, as he began to feel increasingly alienated from the legal faculty, he received a joint appointment to teach at the nearby Mannheim commercial college with the help of Jellinek and the economist Eberhard

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<sup>56</sup> Ibid., 66.

<sup>57</sup> See letters of 29 and 30 April, 7 May, and 31 October 1904, in *Briefe I*, 51, 55.

<sup>58</sup> Letter of 4 March 1905, in *Briefe I*, 59; *Innere Weg*, 75.

<sup>59</sup> Employing that most German form of humor, the pun: “Heidelberg ist...mehr eine Pflanzstätte von Werken des Geistes als von Werken des Fleißes.” *Innere Weg*, 75.

<sup>60</sup> Radbruch, *Einführung in die Rechtswissenschaft* (Leipzig: Quelle & Meyer, 1910), and *Grundzüge der Rechtsphilosophie* (Leipzig: Quelle & Meyer, 1914).

<sup>61</sup> Radbruch to his father, 8 and 21 July 1907, NL Radbruch III.A.7.

Gothein.<sup>62</sup> He was accorded a titular professorship at Heidelberg in 1910, but had to wait until the spring semester of 1914 for a meaningful promotion to associate professor, during which time his first marriage ended in separation and divorce and he struggled with depression. The long-sought promotion came through a call to the university of Königsberg—“ultima Thule,” he lamented—which he accepted “with a heavy heart” and with much embitterment over the last years in Heidelberg.<sup>63</sup> He was to have only one semester’s teaching at Königsberg before the outbreak of the war, during which time he came to know the woman who would become his second wife in 1915. When the war came, he served honorably, first with the Red Cross and then, beginning in the spring of 1916, as an infantryman in the trenches of the Western Front.<sup>64</sup>

What were Radbruch’s relations with his peers at the “seeding ground of works of the spirit,” Heidelberg? It is not possible to understand his thought apart from the contacts he made during the decade he spent there, above all among the members of Max Weber’s “counter-circle.” Radbruch’s legal philosophy is generally taken to be an expression of the southwest-German neo-Kantian value theory associated with Windelband, Rickert, Lask, and Weber, and his views are sometimes regarded as almost interchangeable with Weber’s.<sup>65</sup> It is not quite so simple, of course. We shall examine in the next section the degree to which Radbruch anticipated his later views in his first works of 1902-1903, independent of his Heidelberg contacts—as he later recalled, at the time of his habilitation he had still known “nothing of the southwest German school.”<sup>66</sup> And it has recently been argued that Radbruch’s Kantianism, and even his *neo-*

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<sup>62</sup> Radbruch to Kantorowicz, 5 May 1907, and to his father, 7 August 1907, in *Briefe I*, 114.

<sup>63</sup> Radbruch to Kantorowicz, 3 April 1914, in *Briefe I*, 171.

<sup>64</sup> Radbruch, *Innere Weg*, 79; Radbruch, “Lebensbeschreibung,” (1945) in *GRGA* Vol. 16, p. 317; see also letters of November and December 1915, in *Briefe I*, 204-207.

<sup>65</sup> See, for instance, Stephen P. Turner and Regis A. Factor, *Max Weber and the Dispute Over Reason and Value* (London: Routledge, 1984) and, by the same authors, *Max Weber: The Lawyer as Social Thinker* (London: Routledge, 1994), where quotations from Radbruch are often used as compressed statements of what Weber also believed but expressed more diffusely.

<sup>66</sup> Radbruch to Karl Engisch, 21 September 1941, in *Briefe II*, *GRGA* Vol. 18, 179.

Kantianism, has been overstated.<sup>67</sup> According to this view, his philosophy tended toward an ontological division of reality into “realms” of experience, culture, and value that went well beyond the more modest claims of Kantian critical philosophy, whose “categories” shaped all possible experience but did not purport to possess a reality of the robustness implied by the notion of a “realm.” While this tendency away from the critical philosophy of Kant did not differentiate Radbruch from the later, more “Fichtean” neo-Kantians Rickert and Lask, it is said that his focus on justice as the “idea of law” involved him in a mode of thinking more characteristic of the Marburg-oriented Rudolf Stammler than of the southwest German school.<sup>68</sup> Notwithstanding these claims, however, the importance of Baden neo-Kantian value theory to Radbruch’s thinking cannot be in doubt if we consider the intellectual influences he encountered during his first decade as a scholar, the terms of discussion within which his own work arose, and then the ways in which that work developed the theory.

When he moved to Heidelberg in October of 1903, Radbruch settled in a house owned by the Götz family. This fortuitous fact would lead not only to his first marriage, to Lina Götz, but to his first encounter with the southwest German school. Another new resident in the house, Heinrich Levy, was pursuing his graduate studies in philosophy with Windelband, and he and Radbruch quickly became friends.<sup>69</sup> Within a week of their acquaintance, Radbruch wrote his parents that Levy was “a quite excellent character and agreeable person, and is scientifically very stimulating for me”; the following day, Levy had persuaded him to join him in attending Windelband’s lectures on logic and on free will.<sup>70</sup> By early November, Radbruch was already

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<sup>67</sup> Dietmar von der Pfordten, “Radbruch as an Affirmative Holist: On the Question of What Ought to Be Preserved of His Philosophy,” *Ratio Juris* 21:3 (Sept. 2008), 387-403.

<sup>68</sup> *Ibid.*, 391-94, 396-98. We will have more to say on the notion of the “idea of law” as justice below in Section II.

<sup>69</sup> Levy is best known for his later work on the “Hegel Renaissance,” though he also wrote on Kant and Heidegger.

<sup>70</sup> Radbruch to parents, 28 October 1903, in *Briefe I*, 36; letter of 29 October 1903 to parents, NL Radbruch III.A.3. It may be noted that Radbruch made here the rather anti-Semitic comment that Levy was “the first *entirely*

reporting that he had learned much from Levy.<sup>71</sup> “In debates, in which it was often do-or-die, he convinced me of the Kantian dualism between Is and Ought, reality and value, and of the theories [*Lehren*] of Windelband and Rickert founded on that dualism,” Radbruch recalled in his memoirs, crediting Levy with his first introduction to the “spirit of Heidelberg thinking.”<sup>72</sup> Although both men were sensitive and nervous, and their friendship rather frequently disturbed by misunderstandings, Radbruch’s letters document that he spent much time in conversation with Levy, hiking in the hills around the city or even traveling together to Switzerland. When Levy left for Strassburg in the spring of 1905, Radbruch regretted it, remarking that he had “in daily living together not only learned prodigiously much from him, but also found the opportunity for mutual discussion on everything that the day brought.”<sup>73</sup>

Through Levy’s encouragement and the stimulus of Windelband’s lectures, Radbruch spent the end of 1903 familiarizing himself with Baden neo-Kantianism, and found much that appealed to his way of thinking. He wrote to Kantorowicz already in late October, asking him, “Do you know Rickert’s *Lehre von der Definition*? I regret not having gotten to know it earlier. It contains in part similar lines of thought to my work [the just-completed second dissertation, *Der Handlungsbegriff*]. So I immediately sent Rickert a copy and am very anxious [*gespannt*] for his answer.” He even floated the idea of changing fields and getting a doctorate in philosophy with Windelband.<sup>74</sup> A few weeks later he added, “Before you review my work [*Der Handlungsbegriff*], do read Rickert’s *Theory of the Definition* and express that I’ve overlooked the book. Also, Windelband’s “Contributions to the Theory of the Negative Judgment” ... should

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sympathetic Jew whom I’ve met”; Radbruch was decisively to repudiate anti-Semitism within the first year or so of his stay in Heidelberg, a position from which he never deviated.

<sup>71</sup> Radbruch’s letter of 7 November 1903 refers to Levy, “der mir von Tag zu Tag lieber wird und von dem ich schon viel gelernt habe.” NL Radbruch III.A.3.

<sup>72</sup> Radbruch, *Innere Weg*, 63-64.

<sup>73</sup> Radbruch to parents, 6 April 1905, in *Briefe I*, 64.

<sup>74</sup> Radbruch to Kantorowicz, 29 October 1903, in *Briefe I*, 37.

contain pertinent material. In his wonderful lectures on logic, which I'm talking through with a student of his (to my great gain), he's said almost word-for-word the same thing about judgments and concepts as I have."<sup>75</sup> It is clear that Radbruch was sympathetic to his first forays into neo-Kantianism precisely because the Baden school doctrines were in line with his preexisting style of thought.

But Radbruch's connections with Rickert and particularly with Windelband deepened over the course of the decade following this initial reading. He not only read Windelband's technical essays and his histories of philosophy,<sup>76</sup> but made time during his busy teaching years to attend some of the philosopher's lectures, for instance his 1906 course on Kant.<sup>77</sup> When Windelband died in the fall of 1915, Radbruch wrote to his parents, to whom he had no reason to exaggerate Windelband's importance, that the death was a great loss to Heidelberg and that "I, too, lose in him a teacher who, next to Liszt, has influenced me the most."<sup>78</sup> Naturally enough, he did not see as much of Rickert, who was based in Freiburg until he accepted Windelband's former chair in 1915; but he visited Rickert several times, and he described the first two meetings as "endlessly interesting [*pausenlos interessant*]."<sup>79</sup> Even as his active duty service was about to begin in 1916, Radbruch was still mulling over a switch from law to philosophy through a habilitation with Rickert: he sounded out Max Weber and Karl Jaspers ahead of time to try and

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<sup>75</sup> Radbruch to Kantorowicz, 19 November 1903, NL Radbruch III.E.20: "Ehe Sie meine Arbeit besprechen, lesen Sie ja Rickerts Lehre von der Definition und bringen [Sie] zum Ausdruck, dass ich das Buch übersehen habe. Auch Windelbands Beiträge z. L. v. negat. Urteil, Festgabe f. Zeller 1884, sollen Einschlägiger enthalten. In seinem wundervollen Colleg ueber Logik, das ich mit einem Schüler von ihm zu meinem grossen Gewinn durchspreche, hat er fast wörtlich das Gleiche über Urteil und Begriff gesagt, wie ich."

<sup>76</sup> See, e.g., Radbruch to Karl Jaspers, 25 December 1911, NL Radbruch III.E.17a.

<sup>77</sup> Radbruch to parents, 11 January 1906, NL Radbruch III.A.6.

<sup>78</sup> Radbruch to parents, 27 October 1915, in *Briefe I*, 201.

<sup>79</sup> Radbruch to Lydia Radbruch (née Schenk), end of December 1915 or early January 1916, in *Briefe I*, 208. One of the two previous meetings with Rickert had been in 1910: Radbruch to parents, 7 April 1910, in NL Radbruch III.A.10.

make the case to Rickert.<sup>80</sup> And of course he was kept fully up-to-date with Rickert's thought through the latter's student, and Radbruch's close friend, Emil Lask.

Radbruch and Lask knew each other during the entire decade they shared at Heidelberg. Shortly after his arrival, Radbruch wrote to Kantorowicz that "another person qualified for our circle [the Berlin legal philosophy group] is Dr. Lask..., who has gotten his degree with a first-rate [*vorzüglichen*] dissertation on Fichte's philosophy of history and is now studying law for the purpose of pursuing legal philosophy."<sup>81</sup> Although Lask did indeed leave for Berlin to pursue his legal studies, he soon returned to Heidelberg to take up teaching. Radbruch observed in late 1904 that he and Lask were already very well acquainted and told Kantorowicz that "Lask will, I think, unlock a new world of legal-philosophical thinking for you too."<sup>82</sup> By the following spring, they and a few others had begun to have lunch together daily in the old gothic-fronted Knight's Inn in the cathedral square, a tradition they continued for years.<sup>83</sup> When Radbruch married Lina Götz in 1907, their "dear friend" Lask frequently visited their house, and in 1909-1910 in particular he dined with them "almost daily."<sup>84</sup> In fact, not only did Lask and Radbruch share their research in the evening discussions of the Weber circle, but they took an active cooperative role in each other's scholarship. Lask read the entire manuscript of his *Die Logik der Philosophie und die Kategorienlehre* (*The Logic of Philosophy and the Theory of Categories*) aloud to Radbruch and Lina for their comments and criticisms, and she typed it up for him for the printers.<sup>85</sup> And Radbruch not only listed Lask alongside Windelband, Rickert, and Jellinek as

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<sup>80</sup> Radbruch to Jaspers, 27 January 1916, NL Radbruch III.E.17a. The plan came to nothing.

<sup>81</sup> Radbruch to Kantorowicz, 29 October 1903, in *Briefe I*, 37.

<sup>82</sup> Radbruch to Kantorowicz, 24 December 1904, in *Briefe I*, 57.

<sup>83</sup> See, e.g., Radbruch to parents, 20 May and 19 December 1905, and 17 May 1907, in NL Radbruch III.A.5 and III.A.7. The "Ritter" is still quite a good restaurant.

<sup>84</sup> Radbruch to parents, 22 November 1909, in NL Radbruch III.A.9.

<sup>85</sup> Radbruch to parents, 20 August 1910, in NL Radbruch III.A.10.

one of the main influences on his thought in the preface to his 1914 *Grundzüge*, but he remarked to Jaspers that the book itself “follows in his [Lask’s] tracks.”<sup>86</sup>

We have seen that Radbruch met Max Weber in the spring of 1904, as Weber was beginning to enter Heidelberg social life once more. Radbruch merits only a brief mention in Marianne Weber’s biography of her husband,<sup>87</sup> but she later wrote a heartfelt eulogy for him at the time of his death,<sup>88</sup> and we have the testimony of Weber’s friend Paul Honigsheim that “both Webers respected him very much; Max even called him an *anima candida*.”<sup>89</sup> Radbruch for his part quickly placed Weber among “the half dozen really significant scholars here,” a figure who in retrospect seemed “larger than life,” and Radbruch became a regular attendee at the monthly discussion evenings of the Weber circle.<sup>90</sup> He knew Weber’s methodological writings well soon after they appeared, cited them in his work, and recommended them to colleagues.<sup>91</sup> When his *Grundzüge* was published, Radbruch was more anxious to hear Weber’s response than that of any other scholar, and upon Jaspers’ report of Weber’s criticisms, Radbruch remarked rather resignedly that “Max Weber’s judgment has once again proved itself unerring; it is quite my own [judgment] too...,” the work being as Weber said both too “subtle” (*scharfsinnig*) and too “lightly-wrought” (*leicht gearbeitet*).<sup>92</sup> The two men saw much of each other until Weber’s death.

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<sup>86</sup> Radbruch, “Vorwort,” in *Grundzüge*, v; Radbruch to Jaspers, 7 June 1914, in *Briefe I*, 175-76: “in seinen Spuren wandelt.” See also the clear acknowledgment of Lask’s influence, especially that of his *Rechtsphilosophie*, in *Innere Weg*, 64.

<sup>87</sup> Marianne Weber, *Max Weber: A Biography*, trans. Harry Zohn (New Brunswick, NJ: Transaction, 1988), 452.

<sup>88</sup> Marianne Weber, Vortrag of 27 November 1949, in NL Radbruch I.E.46. Radbruch was, she said, a man of love and spirit, whose conduct after the tragic loss of his children in the Nazi period (one to a skiing accident, and one as a soldier at Stalingrad) helped her to realize that “a man who lives from the spirit [Geist] is not at all to be destroyed.”

<sup>89</sup> Paul Honigsheim, *The Unknown Max Weber*, ed. Alan Sica (New Brunswick, NJ: Transaction, 2000), 200.

<sup>90</sup> Radbruch to parents, 14 June 1904 and 8 January 1909, in NL Radbruch III.A.4 and III.A.9; *Innere Weg*, 62.

<sup>91</sup> Radbruch cites several of Weber’s methodological essays with specific emphasis on their contribution to value theory and value-relativism in *Grundzüge*, 21, 24, 156, 180, 190; Radbruch to Kantorowicz, 22 January 1907, in *Briefe I*, 110, refers to “Max Weber’s critique of Stammler, which I find admirable [trefflich].”

<sup>92</sup> Radbruch to Jaspers, 28 June 1914, and to Kantorowicz, undated (early July 1914), in *Briefe I*, 177; 179.

Karl Jaspers and Radbruch became friends under difficult circumstances, when Radbruch's first marriage was in steep decline. Because their correspondence often dealt with Radbruch's personal troubles and the eventual dissolution of his marriage, some of it was probably destroyed by his second wife. Nonetheless what remains testifies not only to close relations beginning in 1910—to the way in which Radbruch felt that he would “not only be bound to [Jaspers] through great thankfulness but through deep sympathy”—but also to a shared concern with personal authenticity and genuineness [*Echtheit*].<sup>93</sup> As his socialist convictions deepened during the war, Radbruch may have compared Jaspers “aristocratizing chatter” unfavorably with the attitudes of the working-class soldiers of his unit, but he remained in his debt and interested in his views.<sup>94</sup> In a 1949 draft for an afterword to his *Rechtsphilosophie* (which was the name given to the third and subsequent editions of the *Grundzüge*), he noted the recent philosophical popularity of existentialism, naming Heidegger and particularly Jaspers as the major figures in the movement, and remarked that his own legal philosophy was “drafted [*konzipiert*] long before the rise of *Existenzphilosophie*.”<sup>95</sup> He was perhaps thinking of the importance of the non-rational, personal decision with regard to value-choice as well as the emphasis on being “true” to oneself, proto-existential beliefs that he had arrived at before knowing Jaspers, but about which he and Jaspers were agreed.

For the most part, the other law professors whose thinking marked Radbruch's own during his first decade in academic life were not Heidelberg faculty. The exception was Jellinek. Radbruch had likely read some of Jellinek's work before they became personally acquainted; an undated note on the stationery he used during the 1890s recorded his summary of Jellinek's 1878

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<sup>93</sup> Radbruch to Jaspers, 29 December 1912 and 7 June 1914, in *Briefe I*, 159; 175-76; *Innere Weg*, 66.

<sup>94</sup> Radbruch to Lydia Radbruch, 19 June 1916, in *Briefe I*, 218.

<sup>95</sup> “Entwurf eines Nachworts zur ‘Rechtsphilosophie’,” in Radbruch, *Rechtsphilosophie*, Studienausgabe, ed. Ralf Dreier and Stanley L. Paulson (Heidelberg: Müller, 1999), 207.



*Sozialethische Bedeutung von Recht, Unrecht und Strafe* (*Social-Ethical Significance of Law, Injustice, and Punishment*), with its notion of law as the “ethical minimum.”<sup>96</sup> The two became acquainted through Radbruch’s habilitation advisor and Jellinek’s close friend, Lilienthal, and Radbruch reported that the older man’s judgment of his work was sympathetically critical. The results yielded by Radbruch’s *Habilitationsschrift*, said Jellinek, “don’t correspond to the effort expended. There is nothing to be achieved in jurisprudence in intellectual terms alone; the main thing is evaluations; but [Radbruch’s] work strikes a sympathetic chord through the mark of honesty which it carries.”<sup>97</sup> Jellinek showed Radbruch “such warm sympathy” that the latter hoped “to find in him the best support and the example most to be striven for here.”<sup>98</sup> As we saw above, Radbruch listed Jellinek among the main influences on his thought in the foreword to the *Grundzüge*; he also cited his work first among those who had argued for the perspective of value relativism in social scientific and legal thought.<sup>99</sup> And though the two had less to do with one another after 1907,<sup>100</sup> when Radbruch had largely ostracized himself from the legal faculty owing to his marriage, he was genuinely saddened by the older man’s passing in 1911 and spoke at his funeral.<sup>101</sup> Jellinek was, he said, a man of “aesthetically-tempered nature,” whose scientific work reflected his deep belief in the rights of the individual personality, and Radbruch

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<sup>96</sup> NL Radbruch, II.E.72. Notes labeled “Rechtsphilosophie und strafrechtliche Anfänge,” on stationery printed with “Lübeck...den...189\_” [year left blank]: “[J]ellinek] fasst als ethisch auf, was den Bestand der Gesellschaft fördert, auch eine aus egoistischem Motiv vorgenommenen gesellschaftsfördernde Halt[un]g hat ethischen Wert, wenn auch nur geringen, deshalb ist auch das Recht Ethik, wenn auch nur Minimum.”

<sup>97</sup> Radbruch to Kantorowicz, undated (early December) 1903, in *Briefe I*, 42.

<sup>98</sup> Radbruch to parents, 26 November 1903, in NL Radbruch III.A.3.

<sup>99</sup> Radbruch, *Grundzüge*, v; 22.

<sup>100</sup> See Radbruch to his father, 16 November 1907, in NL Radbruch III.A.7: “Since my marriage, Jellinek has probably lost some interest for me.”

<sup>101</sup> Radbruch to his father, 18 January 1911, in *Briefe I*, 140.

emphasized his work on the use of comparative “types” in social science (see Chapter 5) and his contributions to liberalism: a man justly referred to as the Montesquieu of his day.<sup>102</sup>

We have seen in the previous chapter how closely connected Radbruch was with Kantorowicz and the Free Law School, and the impact that Stammler’s philosophy had on the legal theorists of their group. We can, therefore, dispense with further consideration of these influences on Radbruch, apart from noting that Radbruch was willing to give Stammler a particularly important place in stoking his interest in legal philosophy, however little he interacted with Stammler in person.<sup>103</sup> In Section II below, we will consider specific instances in which Radbruch’s agreements with Baden neo-Kantianism or Weberian relativism had sources in contemporary German legal thought antedating his first Heidelberg period.

Radbruch’s political views and his general temperament are also relevant to his ultimate stance on values and value-freedom. Though Radbruch would later become justice minister under several SPD governments during the Weimar Republic, and officially joined the Socialist party after World War I, his politics were more nebulously left-of-center during the period under consideration here. He was sympathetic to socialism from his university days at least, and read some Marx then<sup>104</sup>; like many in Heidelberg, he was attracted to Friedrich Naumann’s National-Social party, and glad that it supported cooperation with moderate socialist speakers, who seemed to him already in 1903 to hold amiable and sensible views.<sup>105</sup> He began to subscribe to the *Sozialistisches Monatsheft* at the same time.<sup>106</sup> During his Heidelberg decade, he was most

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<sup>102</sup> Radbruch, Untitled Obituary for Georg Jellinek, in *Logos* 2 (1911-12), 257-9; reprinted in *GRGA* Vol. 16, 21-24. This is not an exhaustive account of the Heidelberg scholars who were important to Radbruch (others would certainly include Eberhard Gothein, Edgar Jaffé, and Georg Lukács), limited as it is to those who had direct relevance to his thinking about values and value-judgments.

<sup>103</sup> See, e.g. “Entwurf eines Nachworts zur ‘Rechtsphilosophie’,” in Radbruch, *Rechtsphilosophie*, 207-208; Radbruch to Kantorowicz 14 January 1905, NL Radbruch III.E.20.

<sup>104</sup> Radbruch, *Innere Weg*, 41.

<sup>105</sup> Radbruch to his father, 28 November 1903, in *Briefe I*, 40.

<sup>106</sup> Radbruch to Kantorowicz, 19 November 1903, in NL Radbruch III.A.3.

inclined to discuss his political sympathies with Kantorowicz, who, as we have seen, became more of a liberal as Radbruch became more of a socialist; however, he largely remained an “unpolitical” professor until just before the war. In 1912, he became a city assemblyman and greatly enjoyed the practical experience as a way of “turning outward” during the most trying year of his personal life.<sup>107</sup> Attending the funeral of August Bebel in Switzerland in 1913 seems to have been a turning point for him, at least in retrospect; he published an anonymous appreciation of the “great impression” it made on him in a local paper, which, he admitted to Jaspers, was “kitschy [and] sentimental,” but it also helped to “teach him finally where he must stand.”<sup>108</sup> Even after he had committed himself to a socialist viewpoint, however, Radbruch’s stance was notably individualistic, not collectivist, in matters of personal freedom. In his *Einführung in die Rechtswissenschaft*, for instance, he wrote that socialism as a political doctrine presupposed individualism just as much as its liberal rival in its commitment to its ultimate goal of developing the individual “personality”; and he claimed that the socialist worldview was opposed to the holistic notion of the social “totality” as a conservative rather than socialist idea.<sup>109</sup> Needless to say, as in the case of Tönnies and Sombart, Radbruch’s growing socialist sympathies could be seen as yet another factor leading him in the direction of the value-freedom criterion, since it could serve as a defensive posture against the prejudice he faced from the “orthodox” professors so influential in hiring decisions.

Equally hard to isolate as a causal factor, and to assign a relative weight, is Radbruch’s personality and character, which nevertheless almost certainly predisposed him to accept particular views on values and the nature of scholarship. During the first half of his career, at

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<sup>107</sup> Radbruch to Kantorowicz, 20 April 1912, in *Briefe I*, 150.

<sup>108</sup> Radbruch to Jaspers, 25 August 1913, in *Briefe I*, 165, where he also notes his positive impression of Karl Liebknecht; *Innere Weg*, 75.

<sup>109</sup> Radbruch, *Einführung*, 15-16; 42.

least, Radbruch was a shy and retiring person who preferred to remain in the realm of abstract thought,<sup>110</sup> but who nonetheless resolved to hold strong convictions and was willing to push himself to take public stands. He was by nature highly self-conscious and unsure of himself, a fact manifested in almost all of his early correspondence; as late as 1914, he wrote Jaspers of “the danger of self-torturing, self-important preoccupation with one’s own person—of which I’ve just given an example again [in this letter].”<sup>111</sup>

Moreover he saw these tendencies as more than personal attributes: they were characteristic of his age. In some unpublished notes “Über die Selbstbeobachtung” from his first Heidelberg decade, he considered a sort of ontogenetic-phylogenetic analogy between the self-observation of youth and that associated with a self-conscious new stage in human culture such as his own time. In each case, the person or culture too involved in analysis of self “cannot create a new character out of nothing; he [or it] declines for lack of freedom of the will and dies physically too—one thinks of Hermann’s Conradi or Hofmannsthal’s ‘Thor.’”<sup>112</sup> These references, particularly to the Austrian poet Hugo von Hofmannsthal’s play “Der T[h]or und der Tod,” which was a recurrent favorite of Radbruch’s, reflected his immersion in the literary culture of Munich and Berlin when his views were first beginning to form.<sup>113</sup> In his memoirs, he offered a striking depiction of the fin-de-siècle attitudes to which he had been “receptive”: a

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<sup>110</sup> For instance, he wrote his parents that “Ich bin so sehr gewohnt, nur über Abstrakta zu schreiben, dass es mit dem Erzählen nicht mehr recht gehen will,” (21 May 1904, in NL Radbruch III.A.4). See also *Innere Weg*, 53, for Radbruch’s preference for the abstract over the concrete, the concept over “life,” theory over practice during his youth.

<sup>111</sup> Radbruch to Jaspers, 28 June 1914, in *Briefe I*, 178. He also told Jaspers he thought he had been “excessively overestimated” (“maßlos überschätzt”) by his family and in his schooling (letter to Jaspers, 8 May 1912, in NL Radbruch III.E.17a).

<sup>112</sup> “Über die Selbstbeobachtung,” in NL Radbruch II.E.72.6: “kann keinen neuen Charakter aus dem Nichts schaffen, er geht an dem *Mangel der Willensfreiheit* zugrunde und stirbt auch physisch ab; man denkt an Hermann’s Conradi, man denkt an Hofmannsthal’s ‘Thor.’”

<sup>113</sup> The melancholy and immobilized young aristocrat in Hofmannsthal’s play says at one point, “Was weiss denn ich vom Menschenleben? / Bin freilich scheinbar drin gestanden, / Aber ich hab es höchstens verstanden, / Konnte mich nie darein verweben. / Hab mich niemals daran verloren. / Wo andre nehmen, andre geben / Bleib ich beiseit, im Innern stummgeboren.” Hugo von Hofmannsthal, *Kleine Dramen*, vol. 1 (Leipzig: Im Insel, 1907), 59-60.

combination of the half-understood thoughts of Schopenhauer, Nietzsche, and Max Stirner with a universal drive to unmask illusions and prejudices so vigorous as to extend to an attack on the validity of values of all sorts, leading in the direction of pessimism and nihilism. “All that remained after this work of destruction was the glorification of the drive or vitality of life [*der Dynamik des Lebens überhaupt*], an encomium to movement—indifferent to the goal, in service to anything.... [We] inwardly shied away from relinquishing too early the richness of unlimited possibilities for limited realities, from identifying [*festlegen*] firm convictions and forming our characters, which would also be to narrow ourselves. We much rather held ourselves in suspension between the contradictions of this world full of contradictions.”<sup>114</sup> Particularly when combined with the drive to self-observation, he added, this attitude “threatens to empty out all feelings, to dissolve all values, to impede the emergence of any sort of conviction; and there remains only a harrowing emptiness and coldness.”<sup>115</sup>

His temperament, and the bohemian literary culture in which he felt most at home during his student days, inclined Radbruch to relativism and uncertainty about moral and cultural values, while simultaneously building in him an appreciation for the dangers of the self-preoccupation and lack of direction such uncertainty could lead to. As a result, he was attuned even from his pre-Heidelberg period to the need to put an end to it through a resolute decision. We have seen that his main complaint about his upbringing was a lack of emphasis on the building of an independent and decisive character,<sup>116</sup> and his willful, immature flouting of various academic conventions during his first Heidelberg years can be seen from one angle as an

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<sup>114</sup> Radbruch, *Innere Weg*, 39-40.

<sup>115</sup> *Ibid.*, 40.

<sup>116</sup> See above, Section I.

attempt to gain this lacking independence.<sup>117</sup> He later noted that this tendency was present in strictly academic culture as well, and led to the same potential dangers: “The inclination to regard everything as debatable,” which was the attitude dominant in Liszt’s seminar if not in Liszt himself, Radbruch claimed, “could lead to a boundless [*haltlosen*] relativism, and the unavoidable attempt willfully to halt the discussion before any theory [was agreed upon] could lead to an obstinate partisanship [*Parteigeist*]. I confess that I was not entirely untouched by these opposing consequences.”<sup>118</sup> But whatever the dangers, he retained from this period a sort of personal code according to which he resolved not to allow his life to “drain away unlived into unconsciousness” or through inhibitions, but to act, something he first did properly to his satisfaction with his entry into politics in the 1920s.<sup>119</sup>

## **II. Values and Elements of the Value-Freedom Doctrine in Radbruch’s Philosophy of Law, 1903-1914**

Radbruch believed that his personal life, preferences, and experiences helped him to achieve what clarity his philosophy could claim, and what influence it had for students and future lawyers through its aesthetic as well as its intellectual appeal. For instance, he thought that his own initial lack of interest in the law made him a good candidate for introducing the law to ambivalent students. His preface of December 1909 to the *Einführung in die Rechtswissenschaft* remarked that it was an attempt “to write *the* book that [Radbruch] would have liked to read a

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<sup>117</sup> Cf. Kaufmann, *Gustav Radbruch*, 46-47, who puts Radbruch’s occasional forays into social faux-pas and rudeness down to what he sees as an admirable desire to reject “bourgeois” conventions. Radbruch himself later attributed these behaviors to immaturity, and his letters at the time often express regret for his conduct. See *Innere Weg*, 66; and e.g. Radbruch to Jaspers, 29 December 1912, in *Briefe I*, 158.

<sup>118</sup> Radbruch, *Innere Weg*, 55.

<sup>119</sup> *Ibid.*, 33-34.

decade ago,” when he too was just beginning his legal studies and attempting to place law into relationship with other “cultural values,” doctrines of the state, and Weltanschauungen.<sup>120</sup> “Only through the experiences [*Erfahrungen*] of my own soul could I work out the antinomies and paradoxes of the law, as I have done in my *Rechtsphilosophie*. Only because my genuine love belonged to the areas of intellectual life beyond the boundaries of law could my work range so often across the borders between jurisprudence and other sciences.”<sup>121</sup> Moreover, he acknowledged that many of his writings, even when seemingly impersonal and abstract, really reflected his own intimate views: as he remarked to Jaspers, his works could often be seen as “romans-à-clefs [*Schlüsselromanen*]” relating to his own life and thought.<sup>122</sup> It is therefore natural for us next to draw on our findings about Radbruch’s life and influences to help clarify and put in proper context the attitudes toward values, neo-Kantian value theory, and the elements of value-freedom in science that he expressed in the course of his first decade’s work.<sup>123</sup>

The definitive statement for this period is the 1914 *Grundzüge*, whose main themes and positions were developed in various articles and the *Einführung* in the period leading up to that year. Does this mean that commentators are correct in seeing Radbruch’s legal philosophy as an expression of what he learned from Heidelberg neo-Kantianism and relativism? Section I has already given us good reason to believe that Radbruch’s attachment to the subjectivity of values, value-relativism, and to a theory of free individual value-choice pre-dated his first contacts with the Weber circle in Heidelberg. His 1903 dissertation, *Der Handlungsbegriff*, completed before

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<sup>120</sup> Radbruch, *Einführung*, unpaginated preface. [GRGA Vol. 2, 93.]

<sup>121</sup> Radbruch, *Innere Weg*, 39.

<sup>122</sup> Radbruch to Jaspers, 28 June 1914, in *Briefe I*, 178.

<sup>123</sup> In one of his many intellectual-historical studies of previous jurists, Radbruch himself argued that a discussion of the “really lived life” of the biographical subject was underrated but provided essential insight into the subject’s thought. (Quoted from his essay on Oliver Wendell Holmes, Jr. in Spengel, *Jurist in einer Zeitenwende*, 8.)

his encounter with neo-Kantianism and Weber, provides a good indication of where he stood at that time.

The second part of the dissertation was an attempt to gain a unified concept of action for use in criminal law (*Strafrecht*, also penal law) across the full spectrum of crimes and delicts, whether of active conduct or of culpable negligence (*Fahrlässigkeit*) or omission (*Unterlassung*). Radbruch's student and biographer Kaufmann portrays it as being "wholly under the spell of Kantianism" in its preoccupation with purely formal analysis, without, however, noting that Radbruch was at this point familiar only with Rudolf Stammler's Marburg-oriented neo-Kantianism, and that his philosophical authorities in the text were in fact the three *Logics* of John Stuart Mill, Christoph Sigwart, and Wilhelm Wundt.<sup>124</sup> The argument was conducted at a high level of abstraction and generally without results, essentially conceding that the system of criminal law was split down the middle by division into the two categories of culpable action and omission,<sup>125</sup> and has not generally been very highly regarded.<sup>126</sup> Radbruch himself soon recognized his argument as flawed.<sup>127</sup>

Of much greater interest to us is the first, general, part. Here Radbruch began with a defense of the legitimacy of writing on questions of methodology. He acknowledged the criticisms of the Hegelian law professor Josef Kohler that no cleaning of surgical instruments could replace the skilled hand, nor could clearing the kitchen table make a roast, but insisted that after all someone must do the methodological preparation if the basis for legal scholarship was to be regarded as sound.<sup>128</sup> Various features of Radbruch's argument in the first part showed

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<sup>124</sup> Kaufmann, *Gustav Radbruch*, 115. Kaufmann also misdates the published text to 1904, perhaps on the assumption that it reflects the impact of Heidelberg neo-Kantianism in its final, published form.

<sup>125</sup> Radbruch, *Handlungsbegriff*, 143.

<sup>126</sup> See, e.g., the critique of Radbruch's confusion of contradictory concepts (doing vs. not-doing) and contrary concepts (doing vs. not-doing-something) in Spindel, *Jurist in einer Zeitenwende*, 33.

<sup>127</sup> Radbruch to Kantorowicz, 25 June 1904, in *Briefe I*, 54.

<sup>128</sup> Radbruch, *Handlungsbegriff*, 8.



affinities with, or explicit statements in keeping with, the views expressed in his later essays and books. For instance, though he did not make the distinction between “is” and “ought” an explicit principle, it was already part of his thinking. “The lawmaker [*Gesetzgeber*] does not say that such-and-such facts [or elements: *Tatbestand*] will have such-and-such a legal effect as a consequence; rather, he promises that he, the lawmaker, will see to it or commands that the subject [*Untertan*] shall see to it, that these facts shall have these legal consequences. The legal rule is not a declaratory sentence, but rather a constitutive rule, not an ascertaining [*feststellender*] sentence, but rather an establishing [*festsetzender*] rule: not natural law [*Naturgesetz*], but rather norm.”<sup>129</sup> Confusing the two is a logical mistake, one that has been common in the law at least since the early nineteenth-century historical school and the method of dialectics, both of which try to find normative content in historical development.<sup>130</sup> Perhaps recalling Landauer’s presentation of Fritz Mauthner’s ideas from earlier in the year, Radbruch adopted a nominalistic posture and warned against any mistaken hypostatization of concepts or mixing of logical terminology and real objects, whether in Plato’s doctrine of Ideas, scholastic realism, or Hegel’s philosophy, alongside reification of the soul, the will, and the idea of causal power.<sup>131</sup>

Perhaps, following Kaufmann, we can see this separation of “is” and “ought” as indebted to the one neo-Kantian author Radbruch had read by 1903, Rudolf Stammler.<sup>132</sup> Radbruch’s own later statements on who persuaded him to adopt this element of the fact-value distinction are contradictory: as we have seen, in his memoirs he credited Heinrich Levy, whereas in the 1949

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<sup>129</sup> Ibid., 40.

<sup>130</sup> Ibid., 41.

<sup>131</sup> Ibid., 39-40.

<sup>132</sup> Radbruch was in fact preparing to write a review of Stammler’s magnum opus, *Die Lehre von dem richtigen Rechte*, while he was working on his habilitation dissertation, as he remarked to Kantorowicz alongside favorable comments about Stammler’s *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung*: Radbruch to Kantorowicz, 12 September 1903, in *Briefe I*, 33.

draft preface to his *Rechtsphilosophie* he credited Stammler.<sup>133</sup> Both may have had an impact, but what is clear from his dissertation is that Radbruch was not willing to follow Stammler in the latter's attempt to construct a new version of normative natural law. Here Radbruch showed that unlike any of the neo-Kantians (Marburg or Baden), and independent of Weber, he had connected the "is"/"ought" distinction with the non-rationality and subjectivity of values or "oughts." And he did so in the context of a specifically juristic problem.<sup>134</sup>

In the production of legal principles of any degree of generality, observed Radbruch, the standard method is to look to the collection of legally valid past judgments and to distill from them by "induction" a set of principles or rules that serves as the common feature uniting them. These rules may then be applied according to the method of "construction" (*Konstruktion*) used in "conceptual jurisprudence" that we examined in the previous chapter, namely by extending them beyond the specific holdings reached by judges on past cases to new and unforeseen circumstances in present cases. Sometimes the derived principles may logically compel a judgment that does not, as a matter of fact, seem acceptable as an outcome to the judicial process—it is not accorded legal validity. Such an outcome may prompt the judge to view the principle it was based upon as *falsely induced* in the first place. But how is one to know which option to select: whether the outcome is to be accepted or the principles it was based upon are to be rejected? Radbruch's answer is: *Rechtsgefühl*, the "feeling" for, or sense of, law or justice.

As we have seen in the previous chapter, this concept was used by the Free Law movement. It did not necessarily have to mean a non-rational, emotive response, but could signify a general sense of what the just judgment would be like, taking existing law and the clear intentions of the parties in a novel contract or dispute situation into account. For instance,

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<sup>133</sup> Radbruch, "Entwurf eines Nachworts zur 'Rechtsphilosophie'" in *Rechtsphilosophie: Studienausgabe*, ed. Dreier and Paulson, 206-207.

<sup>134</sup> For the following argument, see *Handlungsbegriff*, 16-17.

Radbruch noted, explicitly crediting an oral communication by Kantorowicz for the insight, one way to show that a legal principle has been wrongly induced is to use a procedure of *reductio ad absurdum*, showing by the impossibility of implementing the conclusion that the reasoning had gone wrong somewhere before the final step. But however useful this procedure is in practice, it begs the question. For what is to count as our criterion for determining what is absurd and what is not? Legal scholarship has typically answered using the concepts of the “nature of the case/thing” (*Natur der Sache*) or the “spirit of the law” (*Geist des Gesetzes*), grasping at the will-o’-the-wisp of a factual reality with normative implications. In fact, Radbruch points out, people (*Persönlichkeiten*) who doubt the weight of their own personal judgment often try to clothe themselves in the garments of some such abstract and seemingly authoritative “good thing.” That this is a common event does mean there are such objective sources. As the final court of opinion, he concludes,

There remains then only the individual *Rechtsgefühl*, individual “value-judgments and willed decisions,” [*Werturteile und Willensentscheidungen*], individual conviction of “right law” [*richtigen Recht*], whose significance Stammler recognized in a manner just as brilliant as his attempt to elevate it to a scientific, objective-truth-delivering method was futile. Such conviction will always remain, much rather, “immediate knowledge” or intuition—like all insight into that which should be [*sein soll*].<sup>135</sup>

Here Radbruch simultaneously repudiates Stammler’s attempt at a new normative legal science on Kantian critical foundations, sets out his view of the nature of “value judgments and willed decisions” as matters of intuition and conviction, and suggests the vainness of hopes for reason and scientific method to deliver such value judgments. We considered in Section I some of the sources of Radbruch’s early opinions that might have led him to such a conclusion; another is suggested by the reference he gives to readers at the conclusion of this passage: to the

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<sup>135</sup> Ibid., 17.

1891 Freiburg prorectoral address of the jurist Gustav Rümelin.<sup>136</sup> Rümelin, whom Radbruch often mentioned along with his brother Max as among the most important predecessors of the Free Law movement's way of thinking,<sup>137</sup> had much earlier been among the first to introduce the terminology of value judgments as well as the view that such judgments were inherently subjective and could not achieve the sort of consensus that empirical or logical statements could claim, while still noting their importance for the judicial process.<sup>138</sup> This speech was one of the most cited sources in the general part of Radbruch's dissertation. And he had similar responses to other juristic sources, such as the dissertation of his former fellow student at Berlin, the Swiss Ernst Delaqui. In early January, 1904, again months before any acquaintance with Weber, he wrote to Kantorowicz of his satisfaction with Delaqui's tendency to lay out various partisan positions on a particular question by "clarify[ing] the inner relationship of those views to the dispute" dispassionately without himself taking sides. But what really impressed Radbruch was "the honest acknowledgment" that one couldn't "get away" with making claims about principles, "that the value judgments which hold [*gelten*] are irrational, not to be led back to any principle. This honest and renunciatory [*entsagungsvolle*] realism is very impressive to me, as I'm always wanting to bash my head against the wall with my logicism [*Logizismus*]."<sup>139</sup>

The usual picture, then, that Radbruch's value relativism was owing to the example of Max Weber, is entirely mistaken; and, indeed, there are also indications in this text of why Radbruch was later of the same opinion as Weber about what reason is like and what it *can* be expected to do in relation to values. For instance, reflecting the logic of Sigwart and Mill,

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<sup>136</sup> Gustav Rümelin, *Werturteile und Willensentscheidungen im Civilrecht* (Freiburg i.B.: Lehmann, 1891).

<sup>137</sup> See e.g. Radbruch, "Rechtswissenschaft als Rechtsschöpfung: Ein Beitrag zum juristischen Methodenstreit," *Archiv für Sozialwissenschaft und Sozialpolitik* 20:2 (March 1906), 355-70, here p. 369. The brothers were in fact most closely associated with the related "Jurisprudence of Interests" movement.

<sup>138</sup> Rümelin, *Werturteile und Willensentscheidungen*, 29-31 and passim.

<sup>139</sup> Radbruch to Kantorowicz, 5 January 1904, in *Briefe I*, 46.

Radbruch pictured reasoning largely as the application of deductive logic to the data provided by induction and experience—the latter being the real source of any *new* knowledge (as opposed to psychological realizations about already existing knowledge). Deductive conclusions “contain within them nothing that had not already been contained in the axioms” from which they began; but reason, following Mill and in line with one of Weber’s principal claims, could still help to secure knowledge by checking the consistency of inductions with one another and of the generalizations based on them.<sup>140</sup> The dissertation evinced a strong tendency, as well, to attempt to lead any and all systems of concepts or systems of judgments (propositions) back to ultimate axioms that were themselves basic, a pattern integral to both Weber’s and Radbruch’s antinomianism, as we will see.<sup>141</sup>

Turning to the writings of Radbruch’s Heidelberg period proper, most fundamental to his thought, conceptually speaking, was the attempt to determine the task of legal philosophy in the first place. One traditional and easy way of doing this, of course, was that of legal positivism, which saw little place for philosophy at all. Like the jurists we have considered in the previous chapter, Radbruch was heavily influenced by positivism while rejecting certain aspects of standard positivist thinking. He insisted, like them, on the need to take philosophical and sociological factors into account, rather than seeing the law as a self-contained and pristine system, but he was still generally respectful of the achievements of the “*Allgemeine Rechtslehre*” tradition and he had some trouble deciding which factor was most important to him. Torben Spaak is right that there are still positivist elements in Radbruch’s thinking and that he was not an advocate of natural law all along but only in his last years.<sup>142</sup> As Radbruch wrote to the

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<sup>140</sup> Radbruch, *Handlungsbegriff*, 10-11.

<sup>141</sup> See, e.g., *Ibid.*, 54-55 on the notion of an “Oberbegriff” as the ultimate end of any classificatory system of concepts and an original judgment as the end of any deductive system of legal rules.

<sup>142</sup> Spaak, “Meta-Ethics and Legal Theory,” 261-63, 270-71.

Karlsruhe lawyer Ernst Fuchs, a friend and a militant advocate of the Free Law movement, he was no “born” jurist of the new (sociological) style, but had affinities with the older positivist approach; it was just that he had seen some of its problems, and in some ways he preferred writing legal philosophy because he was unable to decide the question of his allegiance in matters of proper legal practice between the two approaches.<sup>143</sup> This is worth keeping in mind when we observe that his legal philosophy begins with the task of establishing the necessary features of any legal order and has distinct affinities with Stammler’s notion of a formal “natural law with changing content.”

Radbruch resisted the notion that the concept of law itself could be arrived at inductively through comparison of existing positive laws and whole legal orders with one another, or with non-legal customs and morals.<sup>144</sup> Rather, he argued in classic Kantian fashion, the concept of law must necessarily precede the ability to identify given empirical phenomena as legal. This was not the absurd claim that a sound legal philosophy must *temporally* precede the identification of existing law; only that it must *logically* precede it, with the goal of philosophy being not the provision of new knowledge of the law but only the clarification and reformulation of the concept of law already known implicitly through the work of legal science itself.<sup>145</sup> Nor was this merely the sort of logical priority necessary to recognize a ‘token’ of a particular ‘type’ (that is, e.g., that some given particular human behavior is an instance of the type ‘contract agreement’), as critics might suggest. That was a mere “nominal definition,” a classificatory concept imposed for the purpose of useful ordering of legal phenomena. Instead, he suggested, legal philosophy’s task lay in showing through *transcendental* argument the necessary conditions

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<sup>143</sup> Radbruch to Ernst Fuchs, 14 January 1913, in *Briefe I*, 160.

<sup>144</sup> He associated this view (which is not, of course, inherently limited to positivism alone) with the arch-positivist legal theorist Carl Bergbohm, whose *Jurisprudenz und Rechtsphilosophie* (1892) was a classic statement for the dominant camp in Imperial legal academia. See the pages in the following note.

<sup>145</sup> Radbruch, *Grundzüge*, 30-31.

for the existence of any legal phenomena whatsoever. With his usual flair for vivid metaphor, he suggested that this was the difference between a concept that legal phenomena as it were “democratically elect” to order them, and a concept that makes them possible in the first place ““by the grace of God,”” and thereby belonging to the “small aristocracy of *forming* concepts.”<sup>146</sup>

The question, of course, was whether such a universally necessary grounding for law was a revival of natural law thinking. Like many Kantians and neo-Kantians, Radbruch aimed for a “middle ground”—in his case, between the errors of natural law and the errors of positivism. If positivism erred in thinking a concept of law could be derived from mere induction, natural law erred as well. Natural law was not to be proven faulty by pointing out the various conflicting customs of the world, he acknowledged, since that might simply indicate a failure to find the right law. But Radbruch thought that Kantian criticism had shown that no knowledge of the real world of experience was possible on the basis of reason alone, and that the necessity of combining the categories of pure reason with the evidence of the senses in order to have any possible experience meant that reason alone could provide *form* but no *content* to natural law. At most, natural law was “*richtiges Recht*” or “right law,” generally or universally valid but without the ability to compel specific actions or offer specific remedies in all cases, as its demands on human agents would vary across times and social conditions. That is to say, it was, with Stammler, a “natural law with changing content.”<sup>147</sup>

Radbruch sought to be more consistent than Stammler, however, since the latter had no sooner established the formal nature of the demands of “right law” than he proceeded to derive some specific legal rules (content) from them through the “social ideal” of a community of free-willed people. Just as Kant’s theory of knowledge has not shown “how one is to produce one’s

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<sup>146</sup> Ibid., 33. My italics.

<sup>147</sup> Ibid., 4-5.

world-picture [*Weltbild*], but is much rather an analysis of already produced world-pictures,” wrote Radbruch in his notes in the middle of the decade, so also Stammler’s “right law” can only claim to be an analysis of the “already established [*ermittelten*] right law” gained through one’s “*Rechtsgefühl*.”<sup>148</sup> Not only Stammler but Kant too, in his practical philosophy, had attempted unsuccessfully to derive rules with specific content from formal, generalizable maxims.<sup>149</sup> “There is indeed (ostensibly) a method for drawing out the eternal form from the given material and sorting it out from the incidental matter—namely, the critical method. There is, however, by no means a method of wedding the empty form synthetically with *new* matter.”<sup>150</sup> Attempts to do so methodically were simply returns to old-style natural law.

The problem with Stammler, then, was his insufficient commitment to his own dualism of form and content and the injunction not to confuse them. In Radbruch’s own theory, he attempted to remain a consistent dualist as to form and content—not just as to facts and norms, “is” and “ought,” where Stammler like other Kantians did remain consistent. Here the Marburg approach and the Baden approach were at one: norms or values could not be derived from facts, and the study of the effects of empirically existing laws on people’s actions had to be kept separate from the study of laws as systems of norms. Radbruch made his acceptance of this key element of the value-freedom complex clear throughout his early writings.<sup>151</sup> As he wrote in the *Grundzüge*, “Philosophy takes as its object not being [*das Seiende*], but what should be [*das*

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<sup>148</sup> NL Radbruch, II.E.72.13, third sheet.

<sup>149</sup> Radbruch, *Grundzüge*, 23. Radbruch also made the charge of inconsistency against Kant and the claim that no “unambiguously ascertainable [*eindeutig feststellbaren*] categorical imperative” was possible in an unpublished lecture, “Die Wiedergeburt der deutschen Philosophie,” which he gave on 30 June 1916 in the officers’ mess of his army unit: NL Radbruch II.H.6, p. 5.

<sup>150</sup> NL Radbruch, II.E.72.13, fourth sheet, “Zu M.E. Mayers Kritik Stammlers”: “Es gibt zwar (angeblich) eine Methode dafür aus dem gegebenen Material die ewige Form herauszuarbeiten und sie von dem zufälligen Stoffe zu sondern, nämlich die kritische Methode. Keineswegs aber gibt es eine Methode die leere Form nun synthetisch mit neuem Stoffe zu vermählen.” My italics. Note Radbruch’s fairly metaphysical interpretation of Kantian epistemology.

<sup>151</sup> See, e.g. “Rechtswissenschaft als Rechtsschöpfung,” 365: “aus dem Sein kann man nach Kants Lehre ein Sollen nimmermehr herausklauben.”



*Seinsollende*], not reality but value, not the causes but the purpose [*Zweck*], not the being [*Sein*] but the meaning [*Sinn*] of all things. And legal philosophy in particular deals not with the law which holds [*gilt*] but rather with that which should hold, not with the positive but with the right law [*richtigen Rechte*], not with law but with the value, the meaning, the purpose of law—with justice.”<sup>152</sup>

The task of legal philosophy was, then, to deal with the value or values universally presupposed as the grounds of possibility for any phenomenon to “show up” as a legal phenomenon for human observers, without thereby falling into prescriptive natural law. Legal science, on the other hand—*Rechtswissenschaft*—had to deal not just with the “ought,” the “value” or the “purpose” of law, but with the human reality of law as well: what the law *is* or was in a given agreement or dispute. Knowing what we do about Radbruch’s background, it will not be surprising to learn at this juncture that his conviction answer was that legal science is neither a “value-blind” procedure, ignoring the world of values and oughts entirely, nor an evaluative, normative science, but a “value-relating” *cultural* science. Sounding a note that would harmonize with the Southwest neo-Kantians, Radbruch argued this as follows.

In order to examine the a priori conditions for the possibility of law, he suggested, we must consider two a priori ways of thinking. These two divide everything cognizable into “two worlds, two realms, or better ... the duality of approach [*Betrachtungsweise*], which forms two world-pictures from one-and-the-same given [*Gegebenheit*].” They are, as the reader will by now expect, the value-blind natural scientific approach which opens the realm of “is” (*Sein*), reality, and nature; and the evaluating approach, which opens the realm of “ought” (*Sollen*), values, and purposes (*Zwecke*), and which distinguishes between positive and negative evaluations.<sup>153</sup> But

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<sup>152</sup> Radbruch, *Grundzüge*, 2.

<sup>153</sup> *Ibid.*, 35.

law does not seem to fit into either of these categories. Not the first, as “every attempt to make out the law as a discrete unity from the continuum of the given through a purpose-free and value-free approach teaches that the concept of law does not belong to the realm (*Reiche*) of nature”: nothing would appear to the observer to set law apart from other *regular* human behavior and institutional actions. Law, then, is not value-free in the sense of the mid-nineteenth-century “positivist” or scientific perspective. Nor yet does it fit the second category: it was the mistake of natural law to see law as belonging *solely* to the realm of ends and values, to deny any legal rule or statement that stands contrary to the highest legal ends or values, not merely its *justice* but its validity and even its character as law at all.<sup>154</sup> A third possible approach, following Windelband and Lask, is the religious-philosophy of values, awkwardly termed the “value-overcoming” (*wertüberwindende*) approach. This view refuses to distinguish between positive values and negative disvalues (*Unwerte*) by considering them all in the light of divine redemption: that is, it assumes that in the final analysis, all human distinctions between good and evil will be overcome by God’s universal love and the distinction will cease to have meaning. “Value-overcoming,” however, has no more purchase on identifying that area of reality characterized as law than did the second because it, too, is inherently evaluative—in effect, it evaluates all things positively.<sup>155</sup>

Law fits, instead, into the fourth, the “strange between-realm” of culture, where phenomena are picked out from the continuum of reality by their relation to values. It is not evaluative, refusing as it does to sit in judgment on what constitutes a virtue or vice, a true statement or an error, taste or tastelessness, but only to present each instance in its relatedness to moral, scientific, and aesthetic values. Nor, obviously, is it value-blind: “It culls [*auslesen*] from

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<sup>154</sup> Ibid., 36.

<sup>155</sup> Ibid., 37-38.

the given only those elements which stand in some sort of relation to values, which let themselves be subsumed under value-concepts—be it directly, because they represent a realization of a value or a disvalue, or be it indirectly, because in the course of serving as a means or obstruction for the realization of a value, they are illuminated [*bestrahlt*] by the reflection of that promoted value or disvalue.”<sup>156</sup> It is an odd cultural science, to be sure: unlike history or economics, for instance, its subject matter is a set of imperatives. Radbruch distinguished imperatives from norms—a norm holds absolutely and timelessly; an imperative is an actual, empirically existent command to take or avoid a particular action. But these imperatives may be studied in just the same way as any other cultural fact or result of willed human action.

Against the views of Jellinek, Kantorowicz, and Kelsen, therefore, and along with Rickert and Lask, Radbruch maintained that it is “not a normative ought [*Sollen*] [that] forms the object of legal science, but rather an imperative will [*Wollen*]. It is no *Normwissenschaft*, but rather an empirical cultural science.”<sup>157</sup> What, then, of the objection that the science of law is supposed to provide the judge with the knowledge and the means to decide a case—would that not mean that, in some sense, the science itself must impose a *normative* judgment? We will return to this question at the end of this chapter.

To sum up, Radbruch has set the task of legal philosophy as expounding the nature of the value-presuppositions for the possible existence of law, and the task of legal science as showing the way in which legal phenomena *relate* to those ultimate value presuppositions. So what *are* the values necessarily grounding any possible legal order? Radbruch’s reply was that the highest legal value is justice, conceived as “like treatment of like cases.” As various commentators have

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<sup>156</sup> Ibid., 38-39.

<sup>157</sup> Ibid., 73; for his explicit disagreement with Jellinek and Kantorowicz (Kelsen is not mentioned here, though Radbruch was quite familiar with his major 1911 work), and for his endorsement of Rickert and Lask, see 185.

noted, Radbruch drew here on earlier notions of the concept of law than those popular among positivist legal theorists or the Baden neo-Kantians, particularly on Aristotelian and early modern notions of justice prior to the focus on freedom and contract that gained ground in the seventeenth century, though also on Stammler and on Max Weber's "*Rechtsgüterlehre*."<sup>158</sup> Radbruch often referred to this highest value, justice, as the "Idea of Law" (*Rechtsidee*); law, then, is that area of cultural reality which can be made the object of a judgment of justice or injustice; it is that which just law *should* be, whether it really is just law or not; it is that entity (*Seinsgebilde*) which "serves" the legal value (the "Idea of Law") as a "substrate" and "stage" (*Schauplatz*). He offered several other formulations as well. The purport of all of them is to show that the concept of factually existing law is to be distinguished from the value-concept of "right law" (*richtiges Recht*) "but is only producible [*gewinnbar*] through or out of it" by reference to justice.<sup>159</sup> Reference to the value of justice, then, direct or indirect, is necessarily presupposed by any possible legal action or idea, and the latter are not conceivable without it.

But the value itself is purely formal, Radbruch observed: after all, there are many different ways of agreeing on what constitutes the like treatment of like cases.<sup>160</sup> Consequently, in any possible case of the experience of legal phenomena, we must also presuppose another legal value: *Zweck* or *Zweckmässigkeit*, that is, purpose or expediency, which gives content to the formal value of justice. Strictly speaking, this is really an aspect of, or sub-value to, that of justice—since expediency, insofar as it is a universal value, must also be formal; it is really just a clarification of a feature we already know must pertain to justice, namely that it must answer the

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<sup>158</sup> Von der Pfordten, "Radbruch as an Affirmative Holist," 397; Dreier and Paulson, "Einführung in die Rechtsphilosophie Radbruchs," 239; Anton-Hermann Chroust, "The Philosophy of Law of Gustav Radbruch," *Philosophical Review* 53:1 (1944), 23-45, here p. 31. It should be noted that Lask, too, made reference to the idea of justice.

<sup>159</sup> Radbruch, *Grundzüge*, 39.

<sup>160</sup> For instance, to clarify through a modern example, the arguments for and against affirmative action both argue for equal treatment, but disagree about what constitutes equal treatment.

question of how to treat like cases alike. The specific answers provided by different theories of the purpose of law cannot claim universality and necessity, and so are not part of the a priori concept of law. But because this is so, a third value, or again properly speaking a third aspect of the value of justice, *Rechtssicherheit* or legal certainty, must also come into play. If the “content” provided to justice through legal expediency cannot be universal, there will be disagreement about it, but this is intolerable to the concept of law because a law that changes at will cannot be law in the first place. And so positivity, legal certainty, must be seen as a part of justice and therefore of any possible law. This aspect of Radbruch’s philosophy—the threefold nature of the Idea of Law—did not change between 1914 and the 1932 edition of his *Rechtsphilosophie*, and the various articles on the latter edition available in English already provide access to the ideas in question, so we need not belabor these points.<sup>161</sup>

For our purposes, what is most relevant here is the problem raised by expediency. This concept contains the always knotty and troublesome point of intersection between fact and value, between the world of universal, formal validity and the real world of actual laws. Radbruch’s solution is to cut this Gordian knot. He simply acknowledges that rational agreement about the “content” for the idea of the law’s purpose will not obtain, and embraces value relativism. He does so on two grounds having to do with the subjectivity of values, both of which we have already encountered in previous chapters: emotivism and antinomianism. Because value choice cannot occur in a rationally determined way, science, including legal science, cannot make *ultimate* or axiomatic value choices for the human agent, although it still has a role to play in the sphere of value-judgments.

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<sup>161</sup> See the articles listed in Note 158, as well as Spaak, “Meta-Ethics and Legal Theory,” 268. An excellent recent German account of Radbruch’s philosophy in its 1932 form (which again is the same on these points) is Friederike Wapler, *Werte und das Recht* (Baden-Baden: Nomos, 2008), 192-202.

We have seen that Radbruch was tending toward an emotivist or at the very least a non-rationalist picture of value-choice even before his Heidelberg years. This tendency continued throughout his early and middle career. In his important 1906 essay “Die Rechtswissenschaft als Rechtsschöpfung” (Legal Science as Law-Creation), his picture of the judge’s decision on a “hard case,” where there was no agreement about expediency—about which concrete set of values should guide the decision—clearly showed that he regarded the choice as one owing ultimately to personal character, sentiment, and will. We could all agree to strive toward the formal value of “right law,” but “which law is right is [a question] determined solely according to the norms which the judge carries in his breast... The scientific development [*Bearbeitung*] like the practical application of the law consists, that is, in the clarification, rectification, and completion of the positive legal rules in the sense of one’s own value judgments, which make the choice between several possible interpretations and between several mutually contradicting legal rules and [thus] step into the gaps in [existing] legislation. And as in each new creation, so in this one, the judge and legal theorist is engaged with his whole personality, not just with his thinking, but also with his feeling and will.”<sup>162</sup>

This was not just the case for judges, of course. Later that same year, he wrote to his future first wife that different people needed different ethical norms according to their differing characters and personality types; the strong personality needed the Christian virtues of goodness and humility the way the fearful needed the Nietzschean virtues of “fearless, heedless power.” For, he said, “that’s the way it is with ethical norms: they are different for every person,” and alike only in that they instruct one to become something other and better than one’s current self.<sup>163</sup> The fact that this view was not too far afield from Simmel’s “individual law” is

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<sup>162</sup> Radbruch, “Rechtswissenschaft als Rechtsschöpfung,” 365-66.

<sup>163</sup> Radbruch to Linda Götz, 8 December 1906, in *Briefe I*, 108.

emphasized by another letter of the same month to Kantorowicz, where Radbruch remarked that he had been reading Simmel's book *Schopenhauer und Nietzsche* and was "pleased about our methodological kinship with him: how he leads metaphysical questions back, in the end, to the difference between typical characters. And [how he] doesn't see the task of science as being to judge between two points of view [*Ansichten*], but rather to think them all through in all their consequences [or consistency]: that's just what we do with the juristic controversies."<sup>164</sup>

And this was, indeed, the perspective he carried through into his own interventions in legal theory.<sup>165</sup> He enshrined the viewpoint in the opening pages of the *Grundzüge*, writing: "Now, it is a basic idea, to be confirmed in the course of these considerations, that value judgments are not capable of being [matters of] knowledge, but only of commitment [*Bekanntnis*]. And so this book—since facing the decisive questions it will again and again have to admit the unknowability [*Unerkennbarkeit*], the mere avowability [*Bekennbarkeit*] of its answers—must begin at once with an unprovable commitment."<sup>166</sup> This was true even of the dualism of fact and value and the doctrine of the impossibility of deriving values from matters of fact with which the book began—"one of those opinions [*Stellungnahmen*] which can't be further substantiated [*begründet*] but rather may only be more clearly illustrated."<sup>167</sup>

This is not to say that Radbruch's conviction of the rightness of value relativism was an arbitrary stab-in-the-dark. If it could not be shown decisively, it could certainly be more clearly illustrated, and here Radbruch pointed—like Weber—to signs that the realm of values was an antinomian world of conflict and struggle between equally plausible claims. What was one to do, he asked, in cases where different systems of norms or values came into conflict? Should

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<sup>164</sup> Radbruch to Kantorowicz, 29 December 1906, in *Briefe I*, 109.

<sup>165</sup> See, as he mentions in the letter, his essay on obstetrics and criminal law, which appeared shortly thereafter: *Geburtshilfe und Strafrecht* (Jena: Fischer, 1907), 1-34 passim.

<sup>166</sup> Radbruch, *Grundzüge*, 2.

<sup>167</sup> *Ibid.*, 3.

legal norms win out over customary norms, for instance—should duels, demanded by custom in some cases but prohibited by law, be permitted or prohibited? Should a journalist protect his sources as demanded by custom or break their silence in giving evidence as demanded by the law in criminal cases? “Here several groups of norms of conflicting contents confront one another,” Radbruch answered, “neither willing to retire behind the other, each unconditional, ‘categorical,’ mandatory. In such a conflict of groups of norms about their rank-ordering we can only be parties to the dispute and never the judge...,” a situation that holds for us just as it did in ancient times for Sophocles’ *Antigone*.<sup>168</sup>

Nor was this true only of individual cases of moral quandary, but of whole systems of values. Radbruch’s remark about Simmel’s procedure in “leading back” to a difference between people’s characters was indicative of his position. Worldviews, which were in effect systems of values, could be perfectly internally consistent and yet in utter contrast to other worldviews, as they were composed of chains of value judgments that were founded in the last instance on competing but axiomatic value choices. Radbruch, like Weber, loved to contrast religious and worldly ethical systems as the prime if certainly not the only instance of such inevitable antinomian conflict. “We are, each, a stage for the apparently unconquerable contradiction between two ethical systems: a system of duty and love, of peace and humility, and a system of law and honor, of struggle and pride.”<sup>169</sup>

Naturally enough, this problem obtained for *Weltanschauungen* that took political and legal questions into their purview as well as ethical ones. To provide the law with a specific content, with purpose or expediency, was the goal of various ethical and political worldviews that faced off in the same way. He wrote in 1907 that which side one adopted in a disputed legal

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<sup>168</sup> Radbruch, *Einführung*, 13.

<sup>169</sup> Radbruch, “Über das Rechtsgefühl,” *Die Tat* 6 (1914-15), 337-45, here p. 341. Reprinted in *GRGA* Vol. 1, 423-29.



question “is dependent on ultimate standpoints of worldview, which are the last roots of the views struggling against one another in so many legal-scientific controversies: whether one assigns the higher value to the interest or the will of the individual, to reason or to freedom, to the community or the individual.”<sup>170</sup> Long before he wrote the *Grundzüge*, Radbruch had adopted Lask’s division of goods into the “personal” and the “transpersonal.” On the matter of which value to place first—the development of the individual human personality through culture; or the progress and refinement of culture, including the great “causes” and tasks of world history, through individuals’ efforts—people could only disagree.<sup>171</sup> These two perspectives, plus the addition of a third perspective prioritizing social or communal values, seemed to him to help explain the division of the partisan political ideologies that also influenced the question of which purpose the law would adopt.<sup>172</sup> Much of the middle section of the *Grundzüge* is taken up with the specific political worldviews of conservatism, liberalism, socialism, and political Catholicism and the reflections of the personal or transpersonal ethical systems within them. We need not explore these questions in detail; Radbruch’s position is clear. Each of the worldviews is internally consistent, each claims to stand higher than the others,<sup>173</sup> and their opposition requires us to take a position: “reason and science must fall silent before [this opposition]; there is no general truth here.” Paraphrasing the Fichte quotation we have encountered several times in previous chapters, “what kind of philosophy one picks depends on what kind of a person one is, goes a famous saying.”<sup>174</sup>

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<sup>170</sup> Radbruch, *Geburtshilfe und Strafrecht*, 34. Interestingly, in this case, Radbruch follows this sentence with the decision that he will himself abstain from making a judgment in the matter of his topic because of this situation.

<sup>171</sup> See his discussion of these two approaches in *Einführung*, 13-14 and 120-21; “Über den Begriff der Kultur,” 13-14 [sic]; and *Grundzüge*, 89-90.

<sup>172</sup> Radbruch, *Grundzüge*, 95; 125-158 on the political ideologies and the purpose (*Zweck*) of law.

<sup>173</sup> *Ibid.*, 91.

<sup>174</sup> Radbruch, *Einführung*, 16.

This was pure value relativism, and Radbruch was not shy about saying so.<sup>175</sup> He did acknowledge that antinomian conflict might not be the last word about values. In a long letter to Kantorowicz during the stress of wartime service he went so far as to say that in the last analysis, the ability to derive all values, without any mutual contradictions, from a single ultimate “value-axiom” was “an a priori cognitive necessity of any philosophizing.”<sup>176</sup> However, he quickly added that it was difficult to see how to prove this, criticized attempts to come prematurely to a standpoint of “harmony,” and remarked that one might hope for ultimate reconciliation of values but that this was at the very least a non-demonstrable “metaphysical conviction.”<sup>177</sup> Religion and metaphysics were legitimate spheres of belief, and might indeed offer a rank-ordering of values, but they were not science.<sup>178</sup>

In the absence of such far-off hopes, there were also some risks associated with accepting relativism. It could lead to paralyzing uncertainty or indifference, about which Radbruch worried, as we saw above.<sup>179</sup> Just as in the individual case, where his solution was to propose a courageous and definitive personal decision, so in the legal case, the question of competing *Rechtswerte* had to be resolved through a willed decision:

Now, it has proven to be impossible to answer the question as to the purpose of law other than through the enumeration of the various party-opinions about it—and the validity of the positive law is founded precisely on this impossibility of natural law. Relativism, until now only the method of our considerations [in the *Grundzüge*], enters at this point as an element [*Bauglied*] into our system. The ordering of our communal life [*Zusammenlebens*] cannot be left to the opinions on law of the individuals living together, since these different people may give contradictory directives; it must much rather be regulated by a supra-individual authority [*Instanz*]. As, however, reason and

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<sup>175</sup> Radbruch, *Grundzüge*, 24ff.

<sup>176</sup> Radbruch to Kantorowicz, 17 May 1917, in *Briefe I*, 242.

<sup>177</sup> *Ibid.*, 242-43.

<sup>178</sup> Radbruch, “Über den Begriff der Kultur,” 14.

<sup>179</sup> See, e.g., Radbruch, *Innere Weg*, 65; Radbruch to Lydia Radbruch, 2 April 1917, in *Briefe I*, 235.

science cannot execute this task, will and power must take it over: if no one is able to ascertain what is just, then someone must determine [*festsetzen*] what shall be right.<sup>180</sup>

This was the role of the third element of the tripartite “Idea of Law”: the value of legal certainty. Because of the “conflict of individual views of justice,” that is, regarding purpose or “content,” legal certainty represented the most immediate, pressing task of any legal order, which was to end this conflict “through an authentic decision [*authentische Entscheidung*].”<sup>181</sup> No legal order, no pursuit of the value of justice, was possible in the absence of a way of establishing the law beyond the whims or worldviews of given individual citizens. For Radbruch, the authority imposed by legal certainty should not just be the arbitrary imposition of power, despite the affinities of this line of argument with those of Hobbes or later Schmitt. Even if legal philosophy as theoretical reason cannot answer questions of the validity of values, it still “lays all possible objects of evaluation out for choice before the practical reason of the individual—that is, not so much for his arbitrary will [*Belieben*], but rather for his conscience.”<sup>182</sup> Rather than the despairing genuflection before power, as in Pilate’s “what is truth?”, Radbruch insists, relativism leads one to adopt the mentality of Lessing’s *Nathan the Wise*, wherein the silence of theoretical reason is a strong call to practical reason.<sup>183</sup> But the philosophical substance of this insistence is limited as we have seen by the fact that for Radbruch, matters of conscience and character, while they may carry ultimate conviction for one person in the manner of Simmel’s “individual law,” are without necessary and rigorous persuasive power for those other than the deciding individual or authority.

This analysis completed the architecture of Radbruch’s legal philosophy, with its fact-value dualism, its antinomianism and value relativism, and its insistence that reason and legal

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<sup>180</sup> Radbruch, *Grundzüge*, 170-71; see also *Einführung*, 23, 49 for similar conclusions.

<sup>181</sup> *Ibid.*, 171-72.

<sup>182</sup> *Ibid.*, 28.

<sup>183</sup> *Ibid.*

science cannot answer normative questions but must delegate the task to the individual will and its non-rational if not irrational decision. Yet Radbruch is left with some problems. For instance, the three values or three aspects of justice that make up the Idea of Law can come into conflict with one another like any other values with claims to be categorical, and this conflict cannot be resolved for good and all. How does Radbruch's philosophy equip the jurist to judge between the needs of justice, purpose, and certainty when they do not coincide? What, for instance of a situation in which a positive, legally certain law with a specific purpose nevertheless appears unjust—a *Schandgesetz*? There can be no universally valid answer to this question, Radbruch thought, for the reasons he had already given. "That it cannot be answered generally was shown; it can only be decided from case to case, now in one, now in the other direction [*Sinne*]; this decision is, however, to be obtained through the goal [*Zweck*] common to justice and legal certainty, through investigating whether greater harm accrues to this goal in the given case from disregard of the positivity or through disregard of the injustice [*sic*] of the legal rule."<sup>184</sup> This answer—solving the problem of conflict differently at different times, in different cases—is no doubt inevitable given Radbruch's assumptions, and it is certainly accurately descriptive of legal practice. It is not really philosophically satisfying, however, not least because it begs the question of which value-standard to apply to determine what constitutes the "greater harm" in a given case. Relativism was supposed to be confined to the question of what *content* to give to the purpose of law, and not to spread to the question of whether justice is in fact a priori the highest, necessary value for any legal order.

Perhaps an even larger problem is raised by the task of keeping legal science *scientific* (going by Radbruch's assumptions). Does he not reduce *Rechtswissenschaft* to mere personal decision and opinion?

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<sup>184</sup> Ibid., 179.

Radbruch was quite clear that he intended legal science to provide *knowledge* (*Erkenntnis*), not just commitment (*Bekanntnis*).<sup>185</sup> In other words, he had to deal with the problem of scientific objectivity. There were certain things that science could clearly do in addressing value questions even if values were ultimately only subjective, and we have encountered these things before. “The scientific ascertainment of ultimate ends [*Zwecke*] is indeed impossible, but the scientific identification of the appropriate means to the achievement of an end once selected is most definitely conceivable. Thus two soluble assignments remain for a scientific consideration of legal values [*Rechtswertbetrachtung*].” The first was, of course, to investigate the right means to the goals given by a particular doctrine of expediency or purpose; in this capacity, science was *policy* science, “the science of the possible,” finding ways of creating the conditions for compromise between parties so as to move forward toward the purpose set for it.<sup>186</sup>

The second assignment was to check on the internal consistency of one’s value system, and thereby at least “scientifically [to] prepare the personal decision” about legal purpose that was necessary. Scientific consideration could do this “by bringing to mind the general maxims through which each political declaration [*Aussage*], action, or institution is put into use and so tacitly affirmed; that is, by clarifying their political consequences, their presuppositions derived from worldviews, and finally their systematic relationship to other political convictions. It will think the legal purpose [*Rechtswert*] at hand through to the end, in the sense of immanent internal consistency [*Widerspruchslosigkeit*]....”<sup>187</sup> In keeping with this goal, it could observe whether the necessary means were aligned with or in contrast with the values presupposed by the ultimate goal, and could ask the “Kantian-formulated question” of how this legal goal or purpose

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<sup>185</sup> Ibid., 25.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid., 26.

was possible: “which presuppositions must one recognize in order to recognize this legal purpose in a consistent way?” Indeed, legal philosophy could do this systematically for all possible legal-political (*rechtspolitische*) perspectives. Even from a value-relativist standpoint, the scholar could achieve a considerable amount of scientific objectivity, provided he “emphasized conscientiously and everywhere the boundary between knowledge and commitment,” and that he “presented the relationship of his commitment on all sides to other possible commitments.”<sup>188</sup> If, in sum, legal science could permit scholars of all different moral or political views to agree on judgments of means and judgments of internal consistency of value systems, it could not be dismissed as mere opinion or commitment. To take an example from Radbruch’s criminal law interests, a jurist might disagree with his colleagues that the purpose of criminal punishment *should* be the deterrence of crime instead of the reformation of the criminal, but all jurists ought to be able to agree on how to formulate a statute so that it was in fact maximally suited to deter crime in a given social setting.

This answer to the question about what made legal knowledge more substantive than personal opinion put to rest, as it had done for Weber, and to a lesser extent Tönnies, some of the nagging worries about objectivity in the human sciences given the assumption of the subjectivity and omnipresence of value judgments. But another question still loomed. For Weber the problem at this point had been that scholars (let us say, historians) might not agree on the value-criterion for what makes an individual, event, or other cultural object historically significant (see Chapter 1 above) unless values were indeed universally valid, and that this threatened objectivity for value-relativists at a level beyond the determination of means to ends. It threatened the very conception of universally agreed-upon facts in the cultural or historical sciences. Such a problem might well also arise for Radbruch—it is closely related to the first problem we

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<sup>188</sup> Ibid., 27.

considered, regarding the possible conflict between the highest legal values of justice, purpose, and positivity. If some of these phenomena were present without others in a given case, perhaps legal scholars would disagree about what constitutes a legal fact in that case. But let us say that we accept Radbruch's solution that these three values are in fact aspects of one purely formal value, justice, to which any possible legal phenomenon must refer, and that therefore no scholar will be in doubt about the phenomenon's legal character if it makes reference to any notion of justice whatsoever. The question is not, then, one of gaining universal scholarly acceptance of the specifically legal significance of a phenomenon. Even if we grant all this, however, there is still a problem with the objectivity of legal science for Radbruch.

This problem is that the task of legal science seems to be not just to mark out the domain of significant legal facts, but to remain objective or impartial in the *application of justice*, to make *objective judgments* according to legal rules rather than to personal opinions. How can a judge's judgment be the deployment of objective *knowledge* if value judgments must enter into it?

The theory of "conceptual jurisprudence" we have encountered in the previous chapter provided a theory of how objective application of legal knowledge in judging cases might be possible, provided that one simply accepted the legitimacy of the entire legal order. (It could not address "Jellinek's paradox" or answer the question of the *Grundnorm*, to use Kelsen's terminology.) It was simply that any new exigencies could be faced by using the tools of legal science to deduce rules covering these situations from the preexisting concepts provided by the far-seeing original legislator—no matter how novel the situation. This led to the idea of a "gapless" law. The judge, then, needed merely to be an "automaton," in the picture preferred by Radbruch, Kantorowicz, and the Free Law movement: a "subsumption-apparatus, a judgment-

machine, a legal vending machine.”<sup>189</sup> Less amusingly stated, the judge could simply be a legal scholar who was empowered to render judgment, using the standard value-relating cultural scientific approach to find the “facts” (in this case, those legal rules which were applicable in the given situation), and acting in the precise way that any other judge would act in that situation. Thus, the law could be applied objectively.

Had Radbruch accepted this model, it would have fit with the possibility of an objective *cultural* science of the facts of the law, relating aspects of reality to the formal legal values in such a way as to pick them out as significant legal phenomena, and there would be no concern about a loss of scientific status for legal science. But he did not find this picture plausible. “In formulating a statute, just who could avoid all contradiction with any of the impossibly many earlier-issued legal norms?” he asked, and provided as well some examples showing the implausibility of the idea of having a given statute in effect decide all cases in advance.<sup>190</sup> The judge could not simply engage in what Radbruch termed “philological interpretation”—namely, the attempt to find out what the past meaning of a law had been, whether it was sensible or not, contradictory or not. He also had the obligation to deal with the case before him no matter what: even if the results of legal science showed that the existing law was flawed, conflicted, or did not extend to cover the present case.<sup>191</sup> If the law was not “gapless,” then, the judge had to fill it somehow, and as we have seen, for Radbruch in the end he could not use “reason” or “science” but only his own conviction as to what was right. There was, in short, no way to avoid seeing the judge as a lawmaker rather than a technician, a result that violated the separation of powers

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<sup>189</sup> Radbruch, *Einführung*, 65-66. “ein Subsumtionsapparat, eine Urteilsmaschine, ein Rechtsautomat...”

<sup>190</sup> *Ibid.*, 66.

<sup>191</sup> Radbruch, “Rechtswissenschaft als Rechtsschöpfung,” 355-56; *Einführung*, 67.



doctrine.<sup>192</sup> And it also seemed to cast doubt on the possibility of separating law from politics, and factual judgments (about what the law in a given case in fact was) from value judgments.

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<sup>192</sup> Ibid., 357-58.

## **Chapter 6.**

### **Conclusion**

The five scholars considered at length in the preceding chapters have emerged as sophisticated theorists of “value-free” social science, including the social science of law. Many of them knew each other and saw each other as allies. But they came from very different backgrounds and faced discipline-specific problems, the common elements of which might not be readily apparent. They were often drawn to different elements of the value-freedom “complex” itself, whether to the distinctions between theory and practice, fact and value, Is and Ought, or to the means-ends thinking of a positive (non-normative) social science. However important neo-Kantianism is for understanding several of these thinkers, it cannot be regarded as the singular conceptual foundation that underlies value-freedom. The latter is, and was, too readily reached by other intellectual means. Nor can the influence of Max Weber explain the spread of the value-freedom idea, as it often developed independently of and well before his own formulations. Further, can one cannot dismiss the notion of value-freedom as a political doctrine appropriate only to those who support a given social or political order: the political and intellectual variety of the thinkers considered here shows this subsequent twentieth-century assertion to be curiously off the mark. True, it is not a doctrine likely to appeal to those who believe that they have found the one and only answer, and the absence of members of the extreme left or right from our group is not coincidental; however, neither is it accurate to portray value-freedom as, necessarily, liberal politics by other means.

But despite their intellectual differences, our group of five all shared two major beliefs: that social science should accept the domain of human intentions, meanings, goals, and values into its kingdom, and that in that domain value subjectivism was lord.

Subjectivism of this sort, the commitment to the non-rational nature of evaluative judgments, brought with it two main problems. First, there was the problem—simultaneously theoretical and, for several of these thinkers, personal—that in the absence of *rational* claims of any kind for evaluative judgments about ends or goals, programmatic principles, or concepts of the good, it was an open question how such goals or principles should be determined. These thinkers were not attracted by alternative answers such as that goals and “true” (valid) values were set by God or by the authority of tradition, but they could not avoid the question of how the inevitable normative element of human actions was to be grounded. Values must “come” from *somewhere*, as they are presupposed in any goal-directed activity, even the most basic (mere physiological needs-satisfaction, for instance, implies its own very basic value set). That is, this was a “forced option,” in the terminology of William James, where even passivity implied a choice. The path taken by these thinkers, more or less explicitly in individual cases, was to see valuation as a matter first of the individually willed, basically emotive selection of a fundamental or axiomatic value set, and subsequently of the internal consistency of all other valuations within a coherent worldview deriving from that set. Attempts, such as Tönnies’, to view such choices as commonly or intersubjectively understandable nonetheless presupposed a justificatory final grounding in the inner life of the individual. None of these thinkers relied upon any *really existing extra-individual authority*, whether church or party.

Second, when coupled with the rejection of simplistic positivist claims about the exclusion of all values from social science, their subjectivism led them to confront the problem of explaining how objective statements could be made by social scientists at all. Most of them in fact failed to reconcile their explicit commitments to objectivity, their value subjectivism, and their acknowledgement of the role of values in social scientific explanation. In the course of

trying to do so, they quite commonly developed the arguments, traditionally seen as Weberian, about what practical actions a “value-free” science could yet take (means-ends selection, the internal consistency of ideals, and so forth), but they did not secure the “factual” or “theoretical” side of the distinction from the threat of subjectivity. Their virtue, as it were, in taking human mental states and intentions seriously and thereby rejecting positivism, would appear to have cost them a solid grounding for the objectivity of their disciplines. Whether the distinction took the form of the normative and factual sides of the state; the duty of the judge and the factual, cultural science of law; or the contrast between theoretical economics and economic policymaking, their distinctions ultimately relied upon a secure grounding in the “facts.” It is precisely such secure facts, and secure theories based upon them, that the philosophers we discussed in Chapter 1 called into question. The failure of the value-freedom advocates lay not in their analytical distinctions, nor in their analysis of *values*, but in the assumption that universal rationality or some secure “fact” lay at the end of their chains of justification, in the same way that an *ungrounded* value lay at the other.

What of the answer to the objectivity problem raised by those who did not fall back upon an “ascetic” version of objectivity for the inquiring scholar? There was, as we saw, a suggestion in Jellinek that objectivity might be better conceived as a process than as a state, or as a virtue. He shared this view with his Heidelberg colleague, Weber, although neither man elaborated an extensive theory on the basis of his position. For Jellinek, the competition of free minds, thriving in an environment of academic freedom, seemed to provide a kind of selective mechanism – not unlike evolution in the biological world – that would drive science to adapt to reality despite the unavoidability of subjective value judgments.

It is not entirely clear why the notion of value-freedom arose just when it did, but what is clear is that the distinctions normally identified with it—Is/Ought, theory/practice, fact/value—did not by themselves lead to the notion of a value-free science. These doctrines were perfectly compatible with a commitment to one of the older moral sciences, as in the case of a historical economist like Roscher; or to a theory of objective values as in Windelband and Rickert. Our conception of value-freedom must, thus, be widened to include value subjectivism as a *core* component. And as this dissertation has suggested, it also ought to include a commitment to an “interpretive” social science or cultural science. In the German-speaking intellectual world between 1880 and 1914, value-freedom set its adherents apart not only from historicists but from positivists.

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